

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES OF AMERICA, )  
 ) CR-18-00258-EJD  
 PLAINTIFF, )  
 ) SAN JOSE, CALIFORNIA  
 VS. )  
 ) MAY 4, 2021  
 ELIZABETH A. HOLMES, )  
 ) PAGES 1 - 195  
 DEFENDANT. )  
 \_\_\_\_\_ )  
 )

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE EDWARD J. DAVILA  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: UNITED STATES ATTORNEY'S OFFICE  
BY: JOHN C. BOSTIC  
JEFFREY B. SCHENK  
150 ALMADEN BOULEVARD, SUITE 900  
SAN JOSE, CALIFORNIA 95113  
  
BY: ROBERT S. LEACH  
KELLY VOLKAR  
1301 CLAY STREET, SUITE 340S  
OAKLAND, CALIFORNIA 94612

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTERS:

IRENE L. RODRIGUEZ, CSR, RMR, CRR  
CERTIFICATE NUMBER 8074  
LEE-ANNE SHORTRIDGE, CSR, CRR  
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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY  
TRANSCRIPT PRODUCED WITH COMPUTER

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A P P E A R A N C E S: (CONT'D)

FOR DEFENDANT HOLMES: WILLIAMS & CONNOLLY LLP  
BY: KEVIN M. DOWNEY  
LANCE A. WADE  
PATRICK LOOBY  
KATHERINE TREFZ  
AMY SAHARIA  
J.R. FLEURMONT  
SEEMA ROPER  
725 TWELFTH STREET, N.W.  
WASHINGTON, D.C. 20005

SAN JOSE, CALIFORNIA

MAY 4, 2021

P R O C E E D I N G S

(COURT CONVENED AT 9:32 A.M.)

THE COURT: ALL RIGHT. LET'S CALL OUR MORNING  
MATTER. THIS IS 18258, UNITED STATES VERSUS ELIZABETH HOLMES.  
LET ME FIRST CAPTURE THE APPEARANCE OF THE PARTIES,  
PLEASE.

THE CLERK: I HOPE IT'S OKAY.

THE COURT: LET'S GET APPEARANCES OF THE PARTIES.  
WHO APPEARS FOR THE GOVERNMENT?

MR. SCHENK: GOOD MORNING.

JEFF SCHENK FOR THE UNITED STATES. SEATED WITH ME AT  
COUNSEL TABLE FROM THE TABLE LEFT IS KELLY VOLKAR, AND  
ROBERT LEACH, AND JOHN BOSTIC.

THE COURT: GOOD MORNING. WHO APPEARS FOR THE  
MS. HOLMES?

MS. SAHARIA: GOOD MORNING, YOUR HONOR. IT'S VERY  
NICE TO SEE YOU IN PERSON.

AMY SAHARIA FOR THE DEFENDANT ELIZABETH HOLMES.  
WITH ME IN THE COURTROOM IS KEVIN DOWNEY, LANCE WADE, AND  
I'LL LIKE TO INTRODUCE MY COLLEAGUE, SEEMA ROPER.

THE COURT: THANK YOU.

MS. SAHARIA: MS. HOLMES IS PRESENT.

THE COURT: THANK YOU.

MS. SAHARIA: WE HAVE TWO ADDITIONAL ATTORNEYS FROM

09:34AM 1 OUR TEAM WHO WILL BE ADDRESSING THE COURT TODAY,  
09:34AM 2 KATHERINE TREFZ AND J.R. FLEURMONT. THEY ARE HERE IN THE  
09:34AM 3 COURTHOUSE BUT NOT SPECIFICALLY PRESENT IN THE COURTROOM AT THE  
09:34AM 4 MOMENT.

09:34AM 5 THE COURT: ALL RIGHT. THANK YOU.

09:34AM 6 DID THEY WISH TO BE PRESENT IN THE COURTROOM?

09:34AM 7 MS. SAHARIA: IF YOUR HONOR IS COMFORTABLE WITH  
09:34AM 8 THAT, I THINK WE WOULD PREFER FOR THEM TO BE SEATED IN THE  
09:34AM 9 GALLERY SO THAT THEY CAN WATCH IN PERSON.

09:34AM 10 THE COURT: THAT'S FINE. LET ME INDICATE THAT THE  
09:34AM 11 CURRENT PROTOCOLS IS THAT OUR COURTROOM IS CLOSED TO THE  
09:34AM 12 PUBLIC. HOWEVER, WE ARE, AT MY REQUEST, HAVING THIS HEARING IN  
09:34AM 13 PERSON FOR A NUMBER OF REASONS.

09:34AM 14 BUT IF YOU WOULD LIKE THOSE COUNSEL TO BE PRESENT, AS LONG  
09:34AM 15 AS THEY SEAT THEMSELVES IN A SOCIALLY DISTANCED MANNER.

09:34AM 16 I SEE MR. WADE STANDING UP, AND HE'S GOING TO COLLECT THEM  
09:35AM 17 I PRESUME.

09:35AM 18 MS. SAHARIA: I BELIEVE SO. I CAN SEE HIS  
09:35AM 19 REFLECTION. I APPRECIATE THAT, YOUR HONOR.

09:35AM 20 THE COURT: OF COURSE. THANK YOU.

09:35AM 21 LET ME -- AS WE GET STARTED, I JUST THOUGHT THAT I WOULD  
09:35AM 22 JUST INDICATE A COUPLE OF RULES THAT WE WILL FOLLOW FOR THE  
09:35AM 23 HEARING.

09:35AM 24 IT'S MY INTENT, FIRST OF ALL, TO -- WE HAVE A LOT OF WORK  
09:35AM 25 AHEAD OF US, BUT IT'S MY INTENT, I THOUGHT WE WOULD TAKE BREAKS

09:35AM 1 EVERY HOUR, TAKE A SMALL BREAK, MAYBE TEN MINUTE BREAK EVERY  
09:35AM 2 HOUR, AND THEN WE WOULD RESUME AGAIN AFTERWARDS, AND THAT'S FOR  
09:35AM 3 THE COMFORT OF EVERYONE AND ALSO FOR OUR COURT REPORTER AND  
09:35AM 4 STAFF.

09:35AM 5 ALSO, IF AT ANY TIME ANYONE NEEDS TO TAKE A BREAK FOR ANY  
09:35AM 6 REASON, PLEASE LET ME KNOW, AND I'M HAPPY TO ACCOMMODATE THAT  
09:35AM 7 REQUEST AS WELL AS NEEDED.

09:35AM 8 MY THOUGHT WAS THAT ALSO JUST FOR SCHEDULING PURPOSES IS  
09:35AM 9 THAT WE'LL HAVE A 1 HOUR LUNCH RATHER THAN THE TYPICAL  
09:36AM 10 90 MINUTE LUNCH. I HOPE THAT COMPORTS WITH YOUR SCHEDULES.

09:36AM 11 MY SENSE ALSO IS THAT WE WOULD END OUR DAY AROUND  
09:36AM 12 4:00 P.M. DEPENDING ON WHERE WE ARE. I DON'T WANT TO TAKE US  
09:36AM 13 TO 5:00 O'CLOCK, BUT I THOUGHT AROUND 4:00 P.M. MIGHT BE GOOD.  
09:36AM 14 OF COURSE, WE'LL GAUGE THAT ACCORDING TO THE PROGRESS THAT WE  
09:36AM 15 MAKE WITH THIS HEARING.

09:36AM 16 NOW, LET ME ALSO INDICATE THAT OF COURSE I'VE READ AND  
09:36AM 17 REVIEWED ALL OF YOUR MOTIONS, YOUR EXHIBITS, AND MATTERS THAT  
09:36AM 18 YOU'VE FILED IN THIS CASE.

09:36AM 19 MY THOUGHT IS WHAT I WOULD LIKE TO DO IS THAT YOU WILL  
09:36AM 20 RECEIVE AN OMNIBUS RULING ON THESE MOTIONS FROM ME. YOU WON'T  
09:36AM 21 GET THAT TODAY. BUT YOU'LL RECEIVE -- WHAT I HOPE TO DO IS TO  
09:36AM 22 GIVE YOU ORDERS WITH THE COURT'S IMPRESSIONS AND THE COURT'S  
09:36AM 23 ORDERS ON THESE MILS, AND THAT WILL BE FORTHCOMING AFTER OUR  
09:37AM 24 HEARING THIS WEEK.

09:37AM 25 I DON'T KNOW HOW SOON THAT WILL BE, BUT I'M GOING TO

09:37AM 1 ENDEAVOR TO GET THAT TO YOU AS SOON AS POSSIBLE FOR YOUR  
09:37AM 2 INFORMATION. IT MAY BE, HOWEVER, THAT I'LL RULE FROM THE BENCH  
09:37AM 3 OR AT LEAST INDICATE THE COURT'S RULING FROM THE BENCH.  
09:37AM 4 HOPEFULLY THAT WOULD HELP YOU ALSO. AND THEN YOU WOULD RECEIVE  
09:37AM 5 SUBSEQUENT, AS I SAID, FORMAL ORDERS OF THE COURT AS TO SOME OF  
09:37AM 6 THE MOTIONS.

09:37AM 7 I THINK SOME OF THE MOTIONS, AND JUST GIVING YOU SOME  
09:37AM 8 DETAIL IN ADVANCE, SOME OF THE MOTIONS MIGHT BE DEFERRED. SOME  
09:37AM 9 OF THE MOTIONS I MIGHT BE ABLE TO RULE ON THEM HERE AND AT  
09:37AM 10 LEAST TELL YOU THE COURT'S THINKING ON SOME OF THE MOTIONS, AND  
09:37AM 11 OTHERS THAT I'M EAGER TO HEAR YOUR COMMENTS AND FURTHER  
09:37AM 12 ASSISTANCE TO THE COURT.

09:37AM 13 NOW, WHAT I WOULD ALSO LIKE TO DO IS WE'RE HERE IN THE  
09:37AM 14 COVID CIRCUMSTANCE. WE HAVE ALL OF THIS PLEXIGLASS, AND  
09:37AM 15 MS. SAHARIA TOLD US SHE HAD BENEFITS IN SEEING REFLECTIONS AND  
09:38AM 16 THOSE TYPES OF THINGS.

09:38AM 17 WHAT I THOUGHT WE WOULD START WITH IS ALLOWING COUNSEL TO  
09:38AM 18 SPEAK FROM THE LECTERNS. AND LET'S TRY THAT. I JUST WANT TO  
09:38AM 19 SAY THAT THIS IS FOR BENEFIT OF OUR COURT REPORTER AS WELL.  
09:38AM 20 WE'RE ALL WEARING MASKS, AND I APPRECIATE THAT. THIS WOULD  
09:38AM 21 BENEFIT THE COURT REPORTER AND ME AS WELL AS FAR AS LISTENING  
09:38AM 22 TO YOUR ARGUMENTS.

09:38AM 23 CONCURRENT WITH THAT IS I'M GOING TO ASK OUR COURTROOM  
09:38AM 24 DEPUTY TO TURN OFF THE MICROPHONES AT YOUR TABLES SUCH THAT YOU  
09:38AM 25 CAN COMMUNICATE, IF YOU WISH, THOSE OF YOU AT THE TABLE CAN

09:38AM 1 COMMUNICATE WITH EACH OTHER, AND THAT WILL NOT BE COLLECTED ON  
09:38AM 2 THE MICROPHONES. THAT WILL BE PRIVATE.

09:38AM 3 IF, HOWEVER, COUNSEL WISH TO SPEAK FROM THE TABLES, LET ME  
09:38AM 4 KNOW OR LET MS. KRATZMANN KNOW AND SHE CAN TURN YOUR MIKES ON  
09:38AM 5 TO ACCOMMODATE THAT. I'M HAPPY TO DO THAT.

09:38AM 6 ALSO, IF YOU DO SPEAK FROM THE TABLE, AS WELL AS SPEAKING  
09:38AM 7 FROM THE LECTERN, I WOULD BE GRATEFUL IF YOU WOULD SPEAK  
09:39AM 8 DIRECTLY INTO THE MICROPHONE SO WE CAN CAPTURE WHAT YOU SAY.  
09:39AM 9 IT'S A CHALLENGE AS WE'RE GOING FORWARD.

09:39AM 10 THAT'S ONE OF THE REASONS, CANDIDLY, I WANTED US TO GET  
09:39AM 11 TOGETHER TO HAVE AN IN-PERSON HEARING SO WE CAN SEE EACH OTHER  
09:39AM 12 AND ENJOY OUR FELLOWSHIP AND YOU CAN HELP ME HERE, BUT ALSO SO  
09:39AM 13 WE COULD IN ANTICIPATION OF THE TRIAL WE CAN WORK OUT SOME OF  
09:39AM 14 THE NUANCES AND CHALLENGES THAT WE'LL BE FACING DURING THE  
09:39AM 15 TRIAL.

09:39AM 16 I THINK I INDICATED TO YOU IN OUR LAST HEARING, THAT ZOOM  
09:39AM 17 HEARING, THAT IT IS MY HOPE THAT WE WILL HAVE THE TRIAL IN THIS  
09:39AM 18 COURTROOM, IN MY COURTROOM AS OPPOSED TO THE CEREMONIAL  
09:39AM 19 COURTROOM WHERE I THINK SOME OF YOU HAVE LOOKED AT ALREADY AND  
09:39AM 20 GAUGED THAT OUT.

09:39AM 21 BUT IT'S MY HOPE THAT WE WILL HAVE THE TRIAL HERE AND FOR  
09:39AM 22 SELFISH REASONS. I HAVE GREATER COMFORT IN THIS COURTROOM. I  
09:39AM 23 DO THINK THAT IT'S BETTER SUITED FOR OUR NEEDS FOR THE TRIAL.  
09:39AM 24 SO I'M GOING TO ENDEAVOR TO MAKE THAT HAPPEN IF AT ALL  
09:40AM 25 POSSIBLE.

09:40AM 1 SO THOSE ARE THE ONLY INTRODUCTORY COMMENTS THAT I HAVE.

09:40AM 2 DOES ANYBODY HAVE ANYTHING TO SAY INTRODUCTORYWISE ABOUT

09:40AM 3 ANYTHING THAT I'VE COVERED OR ANY QUESTIONS ABOUT ANYTHING I'VE

09:40AM 4 COVERED?

09:40AM 5 MR. SCHENK: NO. THANK YOU, YOUR HONOR.

09:40AM 6 MS. SAHARIA: NO, YOUR HONOR.

09:40AM 7 THE COURT: MR. DOWNEY, I FEEL LIKE I'M AT

09:40AM 8 WRIGLEY FIELD IN A CHEAP SEAT RIGHT BEHIND A POST HERE.

09:40AM 9 MR. DOWNEY: LET ME GET UP FROM BEHIND THE POST.

09:40AM 10 THE COURT: NO, NO. I JUST DON'T WANT YOU TO BE

09:40AM 11 UNCOMFORTABLE AS I MOVE LEFT AND RIGHT HERE.

09:40AM 12 ALL RIGHT. THANK YOU VERY MUCH.

09:40AM 13 MR. DOWNEY: THANK YOU.

09:40AM 14 THE COURT: AND I WANT TO THANK YOU, TOO, FOR

09:40AM 15 PROVIDING THE SCHEDULE OF HOW WE'LL CONDUCT THE MOTIONS, HOW

09:40AM 16 YOU'D LIKE TO HAVE THE MOTIONS CALLED. THAT WAS HELPFUL FOR

09:40AM 17 OUR SCHEDULING PURPOSE.

09:40AM 18 SO REFERRING TO THAT SCHEDULE IT APPEARS THAT THE FIRST

09:41AM 19 MOTION TO BE HEARD IS THE GOVERNMENT'S MOTION IN LIMINE

09:41AM 20 NUMBER 1 WHICH IS TO PRECLUDE THE DEFENDANT FROM OFFERING AN

09:41AM 21 IMPROPER DEFENSE OF BLAMING HER VICTIMS, AND I THINK THIS

09:41AM 22 RELATES TO SOMETHING CALLED THE CULTURE OF SILICON VALLEY

09:41AM 23 STARTUPS.

09:41AM 24 SO WHO WILL ARGUE THAT MOTION FOR THE GOVERNMENT.

09:41AM 25 MR. SCHENK: YES. THANK YOU, YOUR HONOR.



JEFF SCHENK FOR THE UNITED STATES ONCE AGAIN.

YOUR HONOR, THIS MOTION IS ONE THAT I THINK WE CAN  
DISPENSE WITH RATHER QUICKLY. THE PARTIES AGREE THAT INVESTOR  
OR VICTIM NEGLIGENCE IS NOT A DEFENSE, AND BECAUSE OF THAT  
THERE'S A LINE OF ARGUMENTS FOR QUESTIONING THAT FOLLOWS FROM  
THAT AS, THEREFORE, BEING INAPPROPRIATE. THINGS, FOR INSTANCE,  
THAT WOULD ATTACK THE DUE DILIGENCE OF A VICTIM INVESTOR WOULD  
BE INAPPROPRIATE BECAUSE, AGAIN, THE EFFORT OF A VICTIM TO  
LEARN MORE ABOUT THE INVESTMENT, THE SCHEME, THE OPPORTUNITY  
REALLY AREN'T RELEVANT AS THE CASE LAW SUGGESTS.

AND FLOWING FROM THAT, WE WOULD URGE THE COURT, THEREFORE,  
TO RULE THAT ARGUMENTS CONCERNING HOW MUCH A VICTIM RELIES ON  
STATEMENTS MADE TO THAT VICTIM INVESTOR REALLY SHOULD BE  
PROHIBITED.

NOW, THE DEFENSE MAKES A POINT ABOUT ARGUMENTS THAT ARE  
MADE FOR IMPEACHMENT PURPOSES. A VICTIM TAKES THE STAND AND  
TESTIFIES A CERTAIN WAY, THE DEFENSE, THEREFORE, SHOULD BE  
ALLOWED TO IMPEACH WITH INCONSISTENT FACTS OR STATEMENTS. AND  
WE AGREE WITH THAT.

WHAT WE ARE SEEKING IS THE COURT TO PRECLUDE ARGUMENTS  
THAT BLAME THE VICTIMS, THAT SAY THAT THEY DIDN'T DO ENOUGH  
DUE DILIGENCE INVESTIGATION, THAT THE STATEMENTS THAT WERE MADE  
TO THE VICTIM DIDN'T CAUSE THE VICTIM TO ACTUALLY INVEST.  
THOSE KINDS OF ARGUMENTS ARE WHAT THE COURT FROM THIS MOTION  
SHOULD RULE ON, AND THAT REALLY FLOWS FROM THE LINDSEY CASE.

09:43AM 1 IT'S WITH AN E, L-I-N-D-S-E-Y. AND IT HAS HELPFUL LANGUAGE FOR  
09:43AM 2 THE COURT TO DRAW FROM ABOUT THE ABSENCE OF RELIANCE REALLY NOT  
09:43AM 3 BEING A STATEMENT ABOUT WHETHER RELIANCE IS PRESENT IN THE CASE  
09:43AM 4 BECAUSE WE DON'T HAVE TO ACTUALLY RELY FOR THE STATEMENTS TO BE  
09:43AM 5 MATERIAL.

09:43AM 6 AND NOW I'LL TURN TO WHAT THE COURT NOTED AT THE OUTSET,  
09:43AM 7 AND, THAT IS, THERE IS A SECTION IN THE MOTION THAT DISCUSSES  
09:43AM 8 THE CULTURE WITHIN SILICON VALLEY.

09:43AM 9 WHAT THE GOVERNMENT IS SEEKING FROM THE COURT WITH REGARD  
09:43AM 10 TO THAT POINT IS THAT IT'S NOT RELEVANT, AND THE DEFENSE SHOULD  
09:43AM 11 NOT BE ALLOWED TO ARGUE ABOUT WHETHER EXAGGERATION IS COMMON  
09:43AM 12 WITHIN SILICON VALLEY AND OTHERS HAVEN'T BEEN CHARGED  
09:43AM 13 CRIMINALLY; THAT THE GOVERNMENT CHOSE TO PROSECUTE THIS CASE  
09:43AM 14 BUT HASN'T INDICTED OR PROSECUTED COMPANY X OR COMPANY Y, AND  
09:43AM 15 THAT COMPANY ENGAGED IN EXAGGERATION IN OVERSTATEMENT.

09:43AM 16 THEY'RE REALLY ASKING THE JURY TO MAKE ITS DETERMINATION  
09:44AM 17 BASED ON FACTS NOT BEFORE THEM, NOT BASED ON THE GUILT OR  
09:44AM 18 INNOCENCE OF MS. HOLMES ON CERTAIN COUNTS, BUT INSTEAD TO  
09:44AM 19 SPECULATE ABOUT GOVERNMENT CHARGING DECISIONS IN CASES THAT ARE  
09:44AM 20 NOT BEFORE THE COURT.

09:44AM 21 THE COURT: COULD THEY -- THANK YOU, MR. SCHENK.

09:44AM 22 COULD THEY, THE DEFENSE THAT IS, COULD THEY SAY OR COULD  
09:44AM 23 THEY COMMENT EITHER IN AN OPENING OR IN A CLOSING ARGUMENT OR  
09:44AM 24 IN A QUESTION TO A WITNESS, CAN THEY COMMENT THAT IT IS NOT  
09:44AM 25 UNUSUAL IN IPO'S OR NEW VENTURES FOR COMPANY REPRESENTATIVES TO

09:44AM 1 EXTOL THE VIRTUES, THE EXCITEMENT, THE NEW TYPE OF PRODUCT WHEN  
09:44AM 2 IT'S BEING MARKETED?

09:44AM 3 IS THAT SOMETHING THAT THEY CAN TALK ABOUT? THAT THAT'S  
09:44AM 4 WHAT HAPPENS IN SILICON VALLEY WHEN ZOOM TECHNOLOGY CAME OUT  
09:44AM 5 AND EVERYONE EXTOLLED ITS VIRTUES? IS THAT APPROPRIATE?

09:45AM 6 MR. SCHENK: NO. WE WOULD URGE THE COURT TO  
09:45AM 7 PROHIBIT THAT KIND OF ARGUMENT, AND THE REASON BEING IS BECAUSE  
09:45AM 8 IT'S REALLY ASKING THE JURY TO MAKE ITS DETERMINATION BASED ON  
09:45AM 9 FACTORS OTHER THAN THE EVIDENCE PRESENTED TO THE JURY IN THIS  
09:45AM 10 CASE REGARDING MS. HOLMES'S INTENT TO DEFRAUD OR KNOWLEDGE,  
09:45AM 11 MATERIALITY, REALLY THE ESSENCE OF WHAT ARE STRAIGHTFORWARD  
09:45AM 12 CONSPIRACY AND WIRE FRAUD COUNTS.

09:45AM 13 THE COURT: I WAS CURIOUS WHETHER -- IS IT ALL  
09:45AM 14 RIGHT? WOULD IT BE PERMITTED TO HAVE THAT TYPE OF TESTIMONY OF  
09:45AM 15 THIS IS HOW SPONSORS, THIS IS HOW FOUNDERS TALK ABOUT THEIR  
09:45AM 16 PRODUCT WITHOUT TALKING ABOUT THE SECOND PART, WHICH IS "AND  
09:45AM 17 EVERYBODY DOES IT AND NOBODY ELSE WAS PROSECUTED"? JUST THE  
09:45AM 18 STANDALONE FACT WHEN LARRY ELLISON, FOR EXAMPLE, BEGAN  
09:45AM 19 ORACLE -- MAYBE THAT'S A POOR EXAMPLE.

09:45AM 20 WHEN SOMEONE DISCUSSES THEIR NEW PRODUCT, THEIR NEW  
09:46AM 21 DESIGN, THEIR NEW IDEA, IT'S COMMON IN SILICON VALLEY FOR  
09:46AM 22 PROMOTERS TO ENGAGE IN THAT TYPE OF CONDUCT AND THEN VOCABULARY  
09:46AM 23 COMMUNICATION, BUT WITHOUT SAYING THESE OTHER COMPANIES DID  
09:46AM 24 THAT SAME THING AND THEY WEREN'T PROSECUTED?

09:46AM 25 MR. SCHENK: YOUR HONOR, I THINK THAT THE FACTS THAT

09:46AM 1 ARE MISSING FROM THE COURT'S HYPOTHETICAL ARE KNOWLEDGE ON  
09:46AM 2 MS. HOLMES'S PART ABOUT THAT CIRCUMSTANCE.

09:46AM 3 IN OTHER WORDS, WHAT THE JURY SHOULD BE ASKED TO DO IS TO  
09:46AM 4 EVALUATE KNOWLEDGE AND INTENT OF STATEMENTS MADE BY MS. HOLMES,  
09:46AM 5 IN THIS CONTEXT EXAGGERATED STATEMENTS, AND WAS SHE MIMICKING,  
09:46AM 6 WAS SHE DOING IT BECAUSE OTHERS WERE DOING IT? WAS HER INTENT  
09:46AM 7 TO DO IT WAS TO COPY THOSE, AND, THEREFORE, SOME OF THE POINTS  
09:46AM 8 THAT THE COURT JUST MADE CERTAINLY COULD BECOME MORE RELEVANT.

09:46AM 9 BUT I WOULD SAY IN THE ABSTRACT, THAT IS TRUE, IF WE  
09:46AM 10 ACCEPT FOR THE MOMENT THAT IT IS TRUE. IF IT IS JUST A FACT  
09:46AM 11 THAT WITHIN SILICON VALLEY EXAGGERATION OCCURS, THAT ISN'T  
09:47AM 12 RELEVANT. IT HAS TO SOMEHOW BE TIED TO AN ELEMENT THAT IS  
09:47AM 13 RELEVANT FOR THIS JURY'S DETERMINATION, AND I WOULD THINK THAT  
09:47AM 14 THE MOST LIKELY PLACES FOR THAT TIE TO OCCUR ARE TO KNOWLEDGE  
09:47AM 15 OR TO INTENT OF MS. HOLMES.

09:47AM 16 THE COURT: SO I LOOKED AT THIS -- YOU KNOW, THE  
09:47AM 17 INTERESTING THING, MR. SCHENK, AND I THINK YOU AND YOUR  
09:47AM 18 COLLEAGUES OPPOSITE RECOGNIZE THIS, IS THAT MANY OF THESE  
09:47AM 19 MOTIONS ARE RELATED AND OVERLAP IN A VARIETY OF WAYS.

09:47AM 20 THIS IS ONE WHERE I THOUGHT IT MIGHT OVERLAP WITH -- IF  
09:47AM 21 THERE'S EVIDENCE IN FRONT OF THE JURY, AND LET'S FACE IT, THIS  
09:47AM 22 JURY IS GOING TO BE HALED FROM SILICON VALLEY, IF THERE'S  
09:47AM 23 EVIDENCE THAT THERE IS A, I'LL CALL IT A CULTURE OR AT LEAST  
09:47AM 24 THIS IS SOMETHING THAT PROMOTERS DO, AND IF THAT'S PERMITTED,  
09:47AM 25 WON'T YOU AND YOUR TEAM BE PERMITTED TO THEN SAY, WELL, WHILE

09:48AM 1 YOU'VE HEARD THAT TYPE OF CONDUCT IS SOMEWHAT NOT UNUSUAL FOR  
09:48AM 2 PROMOTERS IN SILICON VALLEY, BUT WHAT IS DIFFERENT FROM THAT IN  
09:48AM 3 THIS CASE IS THE DEFENDANT DID X, WOULDN'T YOU BE PERMITTED TO  
09:48AM 4 DO THAT? AND DOESN'T THAT LEVEL THAT PLAYING FIELD SOMEHOW?

09:48AM 5 MR. SCHENK: YES. I SEE THE POINT THE COURT IS  
09:48AM 6 MAKING. CERTAINLY IF THE DEFENSE IS ALLOWED TO SAY THAT THE  
09:48AM 7 ACTIONS OF THERANOS, OR THE ACTIONS OF MS. HOLMES ARE  
09:48AM 8 CONSISTENT WITH ACTIONS TAKEN BY OTHER STARTUPS IN  
09:48AM 9 SILICON VALLEY, THE GOVERNMENT CERTAINLY SHOULD BE ALLOWED TO  
09:48AM 10 SAY LET'S LOOK A LITTLE BIT MORE CLOSELY AT THAT. IS WHAT  
09:48AM 11 MS. HOLMES OR IS WHAT THERANOS DID EXACTLY LIKE, QUITE LIKE, OR  
09:48AM 12 QUITE DIFFERENT FROM THE ACTIONS OF OTHER COMPANIES?

09:48AM 13 I THINK THE COURT IS RIGHT TO POINT THAT OUT, AND I THINK  
09:48AM 14 THE COURT IS REFERRING TO OR IS HINTING AT MOTIONS REGARDING  
09:48AM 15 TRADE SECRET PRACTICES WHEN IT SAID SOME OF THESE MOTIONS  
09:48AM 16 OVERLAP WITH OTHER MOTIONS IN LIMINE THAT ARE NOW BEFORE THE  
09:49AM 17 COURT.

09:49AM 18 THE ONE THING I WOULD CAUTION AGAINST THERE IS THE DEFENSE  
09:49AM 19 IS PAINTING A VERY BROAD BRUSH WHEN THEY'RE SAYING TRADE SECRET  
09:49AM 20 PRACTICES AT THERANOS EXPLAIN SILOING, EXPLAIN THE  
09:49AM 21 NONDISCLOSURE -- THE USE OF -- THE AGGRESSIVE USE OF  
09:49AM 22 NONDISCLOSURE.

09:49AM 23 AND WHAT I WOULD CAUTION AGAINST IS JUST THE ARGUMENT THAT  
09:49AM 24 THE DEFENSE WOULD BE ALLOWED TO SAY LET ME EXPLAIN TO YOU THE  
09:49AM 25 CULTURE OF SILICON VALLEY AND WHY THERANOS LOOKS LIKE THAT,

09:49AM 1 LIKE THERANOS FITS WITHIN BECAUSE I THINK WHAT THAT DOES IS THE  
09:49AM 2 CART BEFORE THE HORSE IS SAYING WHAT HAS OCCURRED AT THERANOS  
09:49AM 3 IS COMMON, IS NORMAL, IS ACCEPTABLE, AND I'M NOT SURE WHICH  
09:49AM 4 ELEMENT IT SPEAKS TO. I'M NOT SURE WHICH OF THE SORT OF  
09:49AM 5 DECISIONS THE JURY IS GOING TO HAVE TO MAKE, DOES THAT SORT OF  
09:49AM 6 TESTIMONY OR EVEN ARGUMENT CLARIFY FOR THE JURY?

09:49AM 7 THE COURT: THIS TOUCHES ON, AND I DON'T WANT TO GET  
09:50AM 8 AHEAD OF OURSELF, FORGIVE ME, BUT IT TOUCHES ON ONE OF THE  
09:50AM 9 MOTIONS ABOUT THE PRECLUSION, THE POTENTIAL PRECLUSION OF  
09:50AM 10 EVIDENCE ABOUT LAVISH SPENDING LIFESTYLE, ET CETERA.

09:50AM 11 I THINK THIS IS ONE OF THOSE TYPE OF SITUATIONS WHERE,  
09:50AM 12 WELL, IS IT NORMAL FOR CEO'S TO FLY IN PRIVATE PLANES? TO HAVE  
09:50AM 13 CARS THAT ARE DRIVEN BY DRIVERS? ET CETERA, ET CETERA. AND  
09:50AM 14 THEIR LIFESTYLE, HOW IS THAT DIFFERENT?

09:50AM 15 WELL, THERE MIGHT BE DIFFERENCES. THIS IS KIND OF THE  
09:50AM 16 SAME SITUATION WHERE I LOOK AT THIS AND I THOUGHT, WELL, I  
09:50AM 17 THINK THE GOVERNMENT WOULD BE PERMITTED TO, IF THIS EVIDENCE  
09:50AM 18 WERE TO COME IN, YOU WOULD BE PERMITTED TO CERTAINLY DRAW THE  
09:50AM 19 JURY'S ATTENTION TO EVIDENCE THAT WHILE THAT MIGHT HAVE A  
09:50AM 20 CONCURRENT THEME IN SILICON VALLEY, THIS CASE IS DIFFERENT FOR  
09:50AM 21 THESE REASONS BECAUSE THIS DEFENDANT DID X, MARKETED THIS AS  
09:51AM 22 ALTRUISTIC IN HER DESIRE TO DO SOMETHING, BUT THE ALTRUISM  
09:51AM 23 CHANGED BECAUSE OF X, HER LIFESTYLE, THOSE TYPES OF THINGS.

09:51AM 24 I'M NOT SUGGESTING WHAT THE EVIDENCE SHOWS, BUT IT'S THE  
09:51AM 25 ARGUMENT THAT YOU WOULD MAKE. I'M TRYING TO SEE WHETHER OR NOT

09:51AM 1 THAT PROTECTS THE GOVERNMENT FROM THE UNTOWARD ISSUE THAT  
09:51AM 2 YOU'RE TALKING ABOUT.

09:51AM 3 MR. SCHENK: YES, I AGREE WITH THE COURT. AND WHILE  
09:51AM 4 I'M NOT THE ATTORNEY THAT WILL ARGUE THE LIFESTYLE MOTION  
09:51AM 5 BEFORE THE COURT, I WOULD NOTE THAT ONE DIFFERENCE THERE IS  
09:51AM 6 THAT THE RELEVANCE OF THAT EVIDENCE IS THAT IT SPEAKS DIRECTLY  
09:51AM 7 TO INTENT. ONE HAS AN INTENT TO CONTINUE A SCHEME IF THE  
09:51AM 8 SCHEME ENCOURAGES, FOSTERS, AND PAYS FOR A LIFESTYLE THAT ONE  
09:51AM 9 APPRECIATES.

09:51AM 10 SO THE ABILITY TO DRAW THE LINE BETWEEN THE EVIDENCE THAT  
09:51AM 11 IS IN QUESTION AND THE ELEMENT IS QUITE A DIRECT LINE.

09:51AM 12 THE COURT: AND I THINK THE GIST OF YOUR MOTION IS  
09:52AM 13 THAT MS. HOLMES AND HER TEAM SHOULD NOT BE PERMITTED TO ARGUE  
09:52AM 14 TO THE JURY THAT OTHER COMPANIES, OTHER CEO'S, OTHER  
09:52AM 15 INDIVIDUALS DO THIS EXACT SAME CONDUCT, AND, THEREFORE,  
09:52AM 16 MS. HOLMES SHOULD BE ACQUITTED FOR THAT REASON BECAUSE THEY'RE  
09:52AM 17 NOT PROSECUTED.

09:52AM 18 MR. SCHENK: PRECISELY.

09:52AM 19 THE COURT: AND I'LL ASK THE DEFENSE WHETHER THAT'S  
09:52AM 20 AN ARGUMENT THAT THEY SEEK TO ADVANCE.

09:52AM 21 MR. SCHENK: PRECISELY. RIGHT.

09:52AM 22 THE COURT: ANYTHING ELSE? I INTERRUPTED YOU WITH  
09:52AM 23 MY QUESTION.

09:52AM 24 MR. SCHENK: NO. SUBMIT IT. THANK YOU.

09:52AM 25 THE COURT: ALL RIGHT. THANK YOU.

09:52AM 1 MS. ROPER: GOOD MORNING, YOUR HONOR.

09:52AM 2 THE COURT: YOU SHOULD STATE YOUR APPEARANCE FOR THE  
09:52AM 3 RECORD.

09:52AM 4 MS. ROPER: YES, YOUR HONOR.

09:52AM 5 SEEMA ROPER ON BEHALF OF MS. HOLMES.

09:52AM 6 THE COURT: THANK YOU.

09:52AM 7 MS. ROPER: YOUR HONOR, I'D LIKE TO FIRST TALK ABOUT  
09:52AM 8 THE GOVERNMENT'S FIRST PART OF ITS MOTION REGARDING THE CONDUCT  
09:52AM 9 -- WHAT IS VICTIM CONDUCT EVIDENCE.

09:52AM 10 THE PARTIES LARGELY SEEM TO BE IN AGREEMENT AS TO THE  
09:53AM 11 SCOPE OF ADMISSIBILITY AS TO THIS EVIDENCE. THE PARTIES AGREE  
09:53AM 12 THAT THE EVIDENCE COULD BE ADMITTED IN CERTAIN CIRCUMSTANCES,  
09:53AM 13 FOR EXAMPLE, TO SHOW MATERIALITY, TO SHOW AS IMPEACHMENT  
09:53AM 14 EVIDENCE.

09:53AM 15 YOUR HONOR, IN THEIR BRIEFS THE GOVERNMENT CITES TO  
09:53AM 16 UNITED STATES VERSUS YANG WHERE ANOTHER DISTRICT IN THIS COURT  
09:53AM 17 FACING AN IDENTICAL MOTION HELD THAT THIS KIND OF EVIDENCE  
09:53AM 18 COULD BE ADMITTED FOR THOSE TWO PURPOSES.

09:53AM 19 WE WOULD ALSO ARGUE, YOUR HONOR, THAT THIS EVIDENCE COULD  
09:53AM 20 BE ADMITTED TO SHOW INTENT, A THIRD PURPOSE. THAT WAS NOT ONE  
09:53AM 21 OF THE PURPOSES FOR WHICH THE DEFENDANTS IN YANG HAD PROFFERED  
09:53AM 22 TO THE COURT, HOWEVER, I BELIEVE THAT THAT IS ANOTHER  
09:53AM 23 ADMISSIBLE PURPOSE FOR THIS EVIDENCE.

09:53AM 24 YOUR HONOR, BECAUSE THE PARTIES AGREE THAT THERE ARE  
09:53AM 25 ADMISSIBLE PURPOSES FOR THIS EVIDENCE, A BROAD ORDER DENYING, A



09:54AM 1 BROAD ORDER DENYING THIS EVIDENCE IN WHOLE, OR EXCUSE ME,  
09:54AM 2 GRANTING -- DENYING THE ADMISSION OF THIS EVIDENCE IN WHOLE  
09:54AM 3 WOULD BE IMPROPER. I THINK IT WOULD BE INCREDIBLY HARD TO DRAW  
09:54AM 4 THE LINES AT THIS TIME WITHOUT THE EVIDENCE BEFORE US.

09:54AM 5 YOUR HONOR, WE REQUEST THAT THE COURT WAIT AND LET THE  
09:54AM 6 GOVERNMENT RAISE ITS OBJECTIONS AT TRIAL TO SPECIFIC EVIDENCE.

09:54AM 7 THE COURT: WELL, LET ME -- I'M SORRY TO INTERRUPT  
09:54AM 8 YOU.

09:54AM 9 MS. ROPER: YES.

09:54AM 10 THE COURT: LET ME ASK YOU, AS I PROMISED MR. SCHENK  
09:54AM 11 I WOULD, ARE YOU GOING TO ARGUE THAT OTHER COMPANIES, OTHER  
09:54AM 12 CEO'S, OTHER NEW COMPANIES HAVE ENGAGED IN THIS CONDUCT AND  
09:54AM 13 THEY WEREN'T PROSECUTED?

09:54AM 14 MS. ROPER: I'M SORRY. YOUR HONOR, I WAS ADDRESSING  
09:54AM 15 THE OTHER FIRST.

09:54AM 16 BUT TO YOUR QUESTION, NO, WE DO NOT INTEND TO MAKE THAT  
09:54AM 17 ARGUMENT AT TRIAL. WE ARE NOT GOING TO BE MAKING A SELECTIVE  
09:54AM 18 PROSECUTION ARGUMENT DURING TRIAL.

09:54AM 19 THE COURT: OKAY.

09:54AM 20 MS. ROPER: WE AGREE WITH THAT, YOUR HONOR.

09:54AM 21 BUT WE DO BELIEVE THAT THAT EVIDENCE ABOUT SILICON VALLEY  
09:54AM 22 CULTURE SHOULD BE ADMITTED FOR OTHER PURPOSES, THE SAME  
09:54AM 23 PURPOSES OF MATERIALITY, INTENT, IMPEACHMENT.

09:54AM 24 THE COURT: WHAT IS THE DIFFERENCE, THEN?

09:54AM 25 MS. ROPER: THE CONDUCT EVIDENCE?

09:54AM 1 THE COURT: YES.

09:55AM 2 MS. ROPER: I THINK THEIR -- AND I COULD BE WRONG.

09:55AM 3 THE GOVERNMENT CAN SAY.

09:55AM 4 I THINK THE GOVERNMENT'S MOTION IS GOING BEYOND JUST THE

09:55AM 5 SILICON VALLEY CULTURE EVIDENCE. I COULD BE WRONG.

09:55AM 6 I THINK THEY'RE TALKING ABOUT OTHER TYPES OF EVIDENCE IN

09:55AM 7 WHICH THE INVESTORS, FOR EXAMPLE, MAY HAVE KNOWN BEYOND JUST --

09:55AM 8 BEYOND WHAT MS. HOLMES MAY HAVE KNOWN ABOUT SILICON VALLEY. I

09:55AM 9 DON'T THINK THAT THEIR MOTION IS LIMITED.

09:55AM 10 BUT IF IT IS LIMITED TO JUST THAT PURPOSE, AND I COULD BE

09:55AM 11 WRONG, YOUR HONOR, IF IT IS ONLY LIMITED TO THIS CULTURE OF

09:55AM 12 SECRECY, OR EXCUSE ME, THIS SILICON VALLEY CULTURE, THEN

09:55AM 13 YOUR HONOR IS CORRECT, THAT WE WOULDN'T BE ADMITTING IT FOR

09:55AM 14 THAT PURPOSE, ADMITTING IT FOR THE PURPOSE OF A SELECTIVE

09:55AM 15 PROSECUTION ARGUMENT.

09:55AM 16 THE COURT: SO WHAT IS THE IMPEACHMENT THAT YOU

09:55AM 17 MENTIONED?

09:55AM 18 MS. ROPER: FOR EXAMPLE, YOUR HONOR, IF SOMEBODY

09:55AM 19 TESTIFIED THAT THEY -- IN SILICON VALLEY NOBODY USES

09:56AM 20 EXAGGERATION, AND WE KNOW THAT IN SILICON VALLEY THAT IS

09:56AM 21 SOMETHING THAT IS DONE, WE WOULD WANT TO ADMIT THAT EVIDENCE TO

09:56AM 22 IMPEACH A WITNESS.

09:56AM 23 THE COURT: IF A GOVERNMENT WITNESS TESTIFIES THAT

09:56AM 24 THERE'S NEVER BEEN EXAGGERATION IN MARKETING OF A NEW PRODUCT?

09:56AM 25 MS. ROPER: CORRECT, YOUR HONOR.

09:56AM 1 THE COURT: I SEE. THEN YOU WOULD IMPEACH AND SAY,  
09:56AM 2 WELL, CERTAINLY. LET'S TALK ABOUT THE LATE STEVE JOBS, AND YOU  
09:56AM 3 COULD JUST PULL ANYBODY OUT AND SAY OF COURSE.

09:56AM 4 MS. ROPER: ANY OF THE BIG STARTUP COMPANIES, ANY  
09:56AM 5 BIG INVESTORS, ANY BIG COMPANIES. LIKE EARLIER YOU GAVE THE  
09:56AM 6 EXAMPLE OF LARRY ELLISON. EXACTLY.

09:56AM 7 THE COURT: OKAY. ALL RIGHT.

09:56AM 8 MS. ROPER: AT THIS TIME, YOUR HONOR, WE WOULD ASK  
09:56AM 9 THE COURT TO DENY THE GOVERNMENT'S MOTION.

09:56AM 10 THE COURT: OKAY. THANK YOU.

09:56AM 11 MR. SCHENK.

09:56AM 12 MR. SCHENK: JUST VERY BRIEFLY, YOUR HONOR.

09:56AM 13 THE GOVERNMENT, FIRST, DOES NOT ANTICIPATE ANYBODY TAKING  
09:56AM 14 THE STAND AND CATEGORICALLY SAYING THAT TYPE OF EXAGGERATION IS  
09:56AM 15 NOT EXISTENT IN SILICON VALLEY. SO I DON'T ANTICIPATE THE NEED  
09:57AM 16 FOR IMPEACHMENT ON THAT SUBJECT TO BECOME NECESSARY IN THIS  
09:57AM 17 TRIAL.

09:57AM 18 OTHER THAN THAT, I'LL SUBMIT TO THE COURT. I DON'T HAVE  
09:57AM 19 ANYTHING TO ADD.

09:57AM 20 THE COURT: ALL RIGHT. THANK YOU. THANK YOU.

09:57AM 21 WELL, I LOOKED AT THIS MOTION, AND IT SEEMED TO THE COURT  
09:57AM 22 THAT WHAT THE GOVERNMENT'S CONCERN WAS, THAT PRIMARILY WAS THAT  
09:57AM 23 THE DEFENSE MAY SAY -- AGAIN, COUNSEL PUT IT AS SELECTIVE  
09:57AM 24 PROSECUTION -- OTHER PEOPLE, THAT THE CULTURE IN SILICON VALLEY  
09:57AM 25 WITH NEW COMPANIES IS THAT THERE'S A LOT OF STATEMENTS, AND WE

ALL KNOW THAT THAT'S WHAT HAPPENS. AND WHY WAS MS. HOLMES PROSECUTED WHEN NOBODY ELSE WAS PROSECUTED FOR SIMILAR CONDUCT?

I'M RELIEVED TO HEAR THAT THE DEFENSE IS NOT GOING TO PROFFER THAT ARGUMENT, AND I APPRECIATE THAT. I THINK IT'S AN INAPPROPRIATE ARGUMENT, AND I THINK THE DEFENSE RECOGNIZES THAT.

SO FOR THAT PART OF THE GOVERNMENT'S MOTION, IF THAT'S WHAT YOUR MOTION WAS POINTED TOWARDS, I GRANT THE MOTION AS TO THAT TO PRECLUDE THE DEFENSE FROM ARGUING THAT PARTICULAR ARGUMENT THAT THIS CONDUCT IS SIMILAR AS OTHER SILICON VALLEY COMPANIES ENGAGED IN, AND THEY WERE NOT PROSECUTED, AND, THEREFORE, THE JURY SHOULD CONSIDER THAT. THAT'S NOT APPROPRIATE.

AS TO THE CULTURE OF SILICON VALLEY AND WHAT IS, WHAT IS THAT CULTURE AND HOW MUCH OF THAT SHOULD BE INTRODUCED, I THINK IF THE GOVERNMENT'S MOTION SEEKS TO PRECLUDE ANY TALK ABOUT THE SILICON VALLEY STARTUP CULTURE AND THAT, AND I DON'T THINK THAT'S WHAT YOU'RE ASKING TO DO. MY SENSE IS THAT THERE'S GOING TO BE SOME NATURAL DISCUSSION ABOUT STARTUP COMPANIES, AND HOW THEY OPERATE, AND WHAT WAS DIFFERENT ABOUT THIS, IF THERE WAS SOMETHING DIFFERENT ABOUT THIS PARTICULAR COMPANY.

SO I CAN'T TODAY SAY THAT I'M GOING TO PRECLUDE THAT CONVERSATION BECAUSE I THINK IT ACTUALLY, IT'S PROBABLY INHERENT, SOME OF THE GOVERNMENT'S CASE IS PREDICATED ON THAT.

SO I'M NOT GOING TO GIVE A BLANKET EXCLUSION OF THAT.

09:59AM 1 BUT I DO THINK THAT THIS IS SOMETHING THAT THE COURT WILL  
09:59AM 2 BE MINDFUL OF AND REVIEW AS THE EVIDENCE COMES IN.

09:59AM 3 AND I THINK IT'S SOMETHING THAT WE'LL RULE ON AS THE  
09:59AM 4 EVIDENCE IS INTRODUCED CONCURRENT WITH THE COURT'S ORDER HERE  
09:59AM 5 THAT THE DEFENSE IS NOT TO PRESENT THIS ARGUMENT.

09:59AM 6 AND THAT'S WHAT I'LL SAY NOW. AND AS I SAID, YOU'LL GET  
09:59AM 7 MORE INFORMATION IN THE COURT'S FINAL ORDER.

09:59AM 8 ALL RIGHT. THE NEXT MOTION THAT I SHOW IS, AGAIN, DOCKET  
09:59AM 9 588, AND IT'S THE GOVERNMENT'S MOTION NUMBER 2 TO PRECLUDE THE  
10:00AM 10 DEFENSE FROM REFERENCING PUNISHMENT IN FRONT OF THE JURY.

10:00AM 11 MR. SCHENK.

10:00AM 12 MR. SCHENK: YES. THANK YOU, YOUR HONOR.

10:00AM 13 I THINK SIMILARLY WITH THIS ONE WE CAN DISPENSE WITH IT  
10:00AM 14 RATHER QUICKLY. LET ME JUST MAKE A COUPLE OF POINTS.

10:00AM 15 THE FIRST IS THAT THE PARTIES AGREE THAT STATEMENTS  
10:00AM 16 REGARDING PUNISHMENT, PENALTIES THE DEFENDANT MAY FACE, ARE  
10:00AM 17 INAPPROPRIATE. AND AS THE COURT KNOWS, THIS IS A STANDARD  
10:00AM 18 MOTION IN LIMINE FILED IN MANY CASES. WHERE THE PARTIES SEEM  
10:00AM 19 TO PART WAYS IS WHAT IN THE BRIEFING IS SORT OF CALLED THE  
10:00AM 20 "MORE SUBTLE REFERENCES TO PUNISHMENT," FOR INSTANCE, THE  
10:00AM 21 PHRASE "SERIOUS CONSEQUENCES."

10:00AM 22 AND SO THERE'S EASY STEPS, AND, THAT IS, NO REFERENCE TO  
10:00AM 23 PUNISHMENT, SIGNIFICANT TIME, FELONY, THINGS LIKE THAT. IT'S  
10:00AM 24 INAPPROPRIATE TO ASK THE JURY TO EVALUATE SOMETHING THAT ISN'T  
10:00AM 25 BEFORE THEM, AND IT'S CLEARLY THE PROVINCE OF THE COURT SHOULD

1 WE GET TO THAT KIND OF STATEMENT.

2 FOR THE MORE CHALLENGING TOPIC, THE SUBTLE REFERENCES TO  
3 PUNISHMENT, THE REASON THE COURT SHOULD PROHIBIT THOSE, IS  
4 BECAUSE THE SAME LOGIC APPLIES. THE REASON YOU DON'T PUT  
5 PUNISHMENT IN FRONT OF THE JURY IS BECAUSE YOU WANT THEM TO  
6 MAKE THEIR DECISION BASED ON RELEVANT EVIDENCE PUT BEFORE THEM.  
7 DID THE GOVERNMENT MEET ITS BURDEN OF PROVING THE ELEMENTS  
8 BEYOND A REASONABLE DOUBT?

9 AND TO ALLOW THE JURY TO HEAR WHAT ARE THE MORE SUBTLE  
10 REFERENCES, "SERIOUS CONSEQUENCES," FOR INSTANCE, FAILS FOR THE  
11 SAME REASON. IT ASKS THE JURY TO EVALUATE EVIDENCE AND TO,  
12 THEREFORE, BE INFECTED BY FACTS THAT ARE AREN'T, QUESTIONS OF  
13 WHETHER THIS ELEMENT WAS PROVEN OR WHETHER THIS ELEMENT WAS NOT  
14 PROVEN.

15 NOW, THERE IS A CASE FROM JUDGE ORRICK, AN ORDER FROM  
16 JUDGE ORRICK IN 2017.

17 THE COURT: WAY UP IN SAN FRANCISCO?

18 MR. SCHENK: IT COULDN'T BE FURTHER FROM US.

19 AND I WOULD URGE THE COURT FOR TWO REASONS NOT TO FOLLOW  
20 IT. FIRST, THAT CASE HAD COOPERATORS WHO HAD PLED GUILTY AND  
21 WERE GOING TO TESTIFY. SO PUNISHMENT PENALTIES WERE COMING IN,  
22 IN THE TRIAL. THAT IS NOT THE CASE HERE.

23 THE SECOND REASON IS SUBTLE REFERENCES TO PUNISHMENT SUCH  
24 AS "SERIOUS CONSEQUENCES" REALLY ARE STILL REFERENCES TO  
25 PUNISHMENT. AND JUDGE ORRICK SORT OF ACCEPTS BUT DOESN'T

10:02AM 1 EXPLAIN WHY THERE'S A DISTINCTION BETWEEN THE TWO. AND I THINK  
10:02AM 2 THAT THE BETTER ARGUMENT REALLY IS THAT "SERIOUS CONSEQUENCES"  
10:02AM 3 IS JUST LIKE SAYING A LARGE AMOUNT OF PRISON OR A FELONY OR  
10:02AM 4 SOME OF THE OTHER CLEARLY INAPPROPRIATE ARGUMENTS TO MAKE.

10:02AM 5 WE WOULD ASK THE COURT TO CHART ITS OWN PATH AND NOT  
10:02AM 6 FOLLOW THE NONBINDING FROM JUDGE ORRICK, AGAIN, NOTING THAT  
10:02AM 7 MOST OF THE TYPES OF ARGUMENTS THAT THE PARTIES AGREE ON HERE  
10:02AM 8 IT WOULD BE INAPPROPRIATE TO MAKE REFERENCE TO.

10:02AM 9 THE COURT: THANK YOU.

10:03AM 10 MS. ROPER: THANK YOU, YOUR HONOR.

10:03AM 11 YOUR HONOR, MS. HOLMES ACKNOWLEDGES THAT IT WOULD BE  
10:03AM 12 INAPPROPRIATE TO IDENTIFY THE PARTICULARS OF A PUNISHMENT THAT  
10:03AM 13 SHE FACES, FOR EXAMPLE, SPECIFIC TERM OF IMPRISONMENT.

10:03AM 14 BUT THE GOVERNMENT'S MOTION GOES TOO FAR IN ASKING FOR  
10:03AM 15 WHAT THEY CALL THESE "SUBTLE REFERENCES TO PUNISHMENT" BECAUSE  
10:03AM 16 THEY ARE NOT IN FACT REFERENCES TO PUNISHMENT AT ALL.  
10:03AM 17 CONSEQUENCES TO A DEFENDANT EXTENDS BEYOND JUST THE TIME THAT  
10:03AM 18 THEY FACE IN PRISON.

10:03AM 19 THE GOVERNMENT HAS NOT IDENTIFIED ANY CASES IN WHICH A  
10:03AM 20 COURT HAS GRANTED THIS BROAD MOTION OVER THE OBJECTION OF  
10:03AM 21 DEFENSE COUNSEL. IN FACT, IT ONLY CITES TO CASES IN WHICH THE  
10:03AM 22 COURTS HAVE PROHIBITED DIRECT REFERENCES TO PUNISHMENT.

10:03AM 23 TWO COURTS IN THIS DISTRICT HAVE DENIED IDENTICAL  
10:03AM 24 GOVERNMENT MOTIONS SEEKING TO EXCLUDE REFERENCES THAT THEY TERM  
10:03AM 25 TO BE "SUBTLE REFERENCES TO PUNISHMENT."

10:03AM 1 THE COURT: WELL, IS IT THE DEFENSE THOUGHT THAT YOU  
10:03AM 2 WOULD RAISE IN A SUBTLE MANNER SOMETHING LIKE "THIS CASE HAS  
10:04AM 3 SERIOUS CONSEQUENCES TO MS. HOLMES"?

10:04AM 4 IS THAT WHAT YOU INTEND TO DO?

10:04AM 5 MS. ROPER: YOUR HONOR, I THINK, FOR EXAMPLE,  
10:04AM 6 PROSECUTORS, DEFENSE COUNSEL LIKE OFTEN AT THE BEGINNING OF THE  
10:04AM 7 TRIAL, PERHAPS IN THEIR OPENING OR IN THEIR CLOSING STATEMENT  
10:04AM 8 AT THE END OF THE TRIAL WILL REMIND JURORS ABOUT THEIR SERIOUS  
10:04AM 9 RESPONSIBILITY, THEIR SOLEMN OATH IN THE CASE. THEY MAY REMIND  
10:04AM 10 JURORS TO PAY SPECIFIC ATTENTION BECAUSE THE CASE HAS SERIOUS  
10:04AM 11 CONSEQUENCES TO THE DEFENDANT. I DON'T THINK --

10:04AM 12 THE COURT: THAT'S WHERE THIS COMES IN. IT'S  
10:04AM 13 ARGUMENT. IT'S NOT EVIDENCE, IT'S ARGUMENT.

10:04AM 14 THE QUESTION IS, IS IT INAPPROPRIATE ARGUMENT?

10:04AM 15 ISN'T IT COMMON KNOWLEDGE THAT ANY FEDERAL CRIMINAL  
10:04AM 16 PROSECUTION IS A SERIOUS MATTER?

10:04AM 17 MS. ROPER: CORRECT, YOUR HONOR. THERE'S -- AND  
10:04AM 18 THAT'S MY POINT. THESE ARE CONSEQUENCES THAT EXTEND BEYOND  
10:04AM 19 JUST GOING TO PRISON. THIS IS SOMETHING THAT STAYS WITH  
10:04AM 20 SOMEONE AS A CONVICTED FELON FOR THE REST OF THEIR LIFE WHETHER  
10:04AM 21 THEY --

10:04AM 22 THE COURT: WELL, THAT'S PART OF PUNISHMENT, TOO,  
10:04AM 23 ISN'T IT? YOU TALK ABOUT MAYBE FINES AND THOSE TYPES OF  
10:04AM 24 THINGS. THAT IS PART OF PUNISHMENT.

10:05AM 25 MS. ROPER: I THINK, YOUR HONOR, THE CONCERN THAT



1 THE CASES HAVE, FOR EXAMPLE, IN U.S. VERSUS SHANNON, THE  
2 CONCERN IS ACTUALLY THAT THEY JURY WILL GO BEYOND THEIR ROLE AS  
3 FACT FINDER AND TRY TO GET INTO YOUR HONOR'S ROLE AT THE END OF  
4 THE CASE, IF IT GETS INTO THE SECOND PHASE, AT SENTENCING.

5 THESE PHRASES, THESE REFERENCES TO THE SERIOUSNESS OF THE  
6 CASE, THEY DON'T ASK THE JURY TO STEP INTO THAT ROLE. THEY  
7 DON'T DISTRACT THE JURY FROM THINKING ABOUT WHAT THE POSSIBLE  
8 SENTENCE MIGHT BE AT THE END OF THE TRIAL. THAT'S THE  
9 DIFFERENCE BETWEEN THE TWO, AND IT'S A SUBTLE DIFFERENCE.

10 THE COURT: SO THIS CASE HAS SERIOUS CONSEQUENCES  
11 FOR MY CLIENT IS WHAT YOU'RE SUGGESTING YOUR TEAM MIGHT PUT  
12 BEFORE THE JURY EITHER IN OPENING OR CLOSING?

13 MS. ROPER: PERHAPS, YOUR HONOR. AND IN CONTEXT FOR  
14 THE EXAMPLE THAT I GAVE, IN THE CONTEXT OF WHY IT'S VERY  
15 IMPORTANT FOR THE JURY TO PAY ATTENTION, TO REMEMBER THEIR  
16 OATH.

17 YOUR HONOR, AGAIN, THIS U.S. V. WILLIAMS AND U.S. V.  
18 GAINES, TWO DIFFERENT DISTRICT COURTS IN THIS DISTRICT, WHO  
19 FACE IDENTICAL MOTIONS FOUND TWO TYPES OF STATEMENTS.

20 THE CASE HAS SERIOUS CONSEQUENCES FOR THE DEFENDANT OR  
21 YOUR DECISION WILL HAVE CONSEQUENCES ARE DIFFERENT THAN THOSE  
22 THAT ARE PROHIBITED UNDER THE LAW.

23 THE COURT: WHAT IS IT THAT THE DEFENSE SEEKS TO  
24 GAIN BY INFORMING EITHER OF THOSE TWO STATEMENTS? WHAT DO YOU  
25 THINK THAT DOES?

10:06AM 1 MS. ROPER: YOUR HONOR, IT'S JUST A REMINDER TO THE  
10:06AM 2 JURY THAT THESE ARE -- THIS IS A SIGNIFICANT MATTER. IT'S  
10:06AM 3 GOING TO BE A LONG TRIAL. WE WANT TO MAKE SURE THAT THE JURORS  
10:06AM 4 UNDERSTAND AND APPRECIATE THAT THIS IS AN IMPORTANT CASE AND  
10:06AM 5 THAT THEY SHOULD BE PAYING ATTENTION THROUGH THIS TRIAL.  
10:06AM 6 THAT'S THE GOAL.

10:06AM 7 THE COURT: SO A PHRASE LIKE THAT, I DON'T THINK THE  
10:06AM 8 GOVERNMENT WOULD HAVE ANY OBJECTION IF YOU SAID "THIS IS AN  
10:06AM 9 IMPORTANT CASE."

10:07AM 10 I THINK THEIR OBJECTION IS "THIS IS AN IMPORTANT CASE  
10:07AM 11 BECAUSE IT HAS SERIOUS CONSEQUENCES FOR MY CLIENT."

10:07AM 12 MS. ROPER: YOUR HONOR, I APPRECIATE THAT THAT'S THE  
10:07AM 13 CONCERN. I DON'T THINK THAT THAT PHRASE IS A REFERENCE TO THE  
10:07AM 14 PUNISHMENT SHE SEEKS -- OR THAT SHE MAY FACE, AND I DON'T  
10:07AM 15 BELIEVE THAT THE LAW PROHIBITS ANYTHING MORE THAN JUST THESE  
10:07AM 16 DIRECT REFERENCES TO PUNISHMENT.

10:07AM 17 THE COURT: WELL, I DON'T KNOW WHY -- I JUST DON'T  
10:07AM 18 UNDERSTAND WHY YOUR TEAM WOULD WANT TO FLIRT WITH THE MARGINS  
10:07AM 19 OF THIS. YOU KNOW, AND YOUR TEAM KNOWS, THAT YOU CAN'T GET UP  
10:07AM 20 AND SAY, "PLEASE BE CAREFUL BECAUSE MY CLIENT CAN GO TO PRISON  
10:07AM 21 DEPENDING ON YOUR JUDGMENT." YOU CAN'T DO THAT. YOU'RE NOT  
10:07AM 22 GOING TO.

10:07AM 23 MS. ROPER: I AGREE, YOUR HONOR, WE'RE NOT GOING TO  
10:07AM 24 BE SAYING THAT.

10:07AM 25 THE COURT: NOBODY IS GOING TO BE SAYING THAT.

10:07AM 1 RIGHT.

10:08AM 2 AND I SOMETIMES AM CURIOUS ABOUT WHY THIS CONVERSATION,  
10:08AM 3 AGAIN, IS WHAT I CALL IS AT THE MARGINS? WHAT DOES THAT REALLY  
10:08AM 4 SEEK TO DO?

10:08AM 5 I UNDERSTAND, AS YOU PUT IT, IT REMINDS THEM OF THEIR  
10:08AM 6 SOLEMN OATH THAT THE SERIOUSNESS OF THE WORK THAT THEY MUST DO,  
10:08AM 7 WHICH IS APPROPRIATE. I THINK THAT IS ENTIRELY APPROPRIATE,  
10:08AM 8 THE SERIOUS NATURE OF THE WORK THAT THEY DO.

10:08AM 9 WE'RE GOING TO TAKE PEOPLE OUT OF THEIR HOMES AND JOBS FOR  
10:08AM 10 SEVERAL WEEKS, AND IT'S A COMMITMENT TO THE JUSTICE SYSTEM, AND  
10:08AM 11 THE OATH THAT THEY'LL TAKE AS JURORS TO LISTEN TO THIS  
10:08AM 12 EVIDENCE, AND KEEP AN OPEN MIND THROUGHOUT THE TRIAL.

10:08AM 13 MS. ROPER: EXACTLY, YOUR HONOR.

10:08AM 14 THE COURT: AND I ENCOURAGE THE PARTIES TO REMIND  
10:08AM 15 THE JURY OF THEIR SOLEMN OATH.

10:08AM 16 WHEN WE START TO GET A LITTLE AT THE MARGINS, AS I SAY, IS  
10:08AM 17 IF THE JURY IS TRYING TO BE AFFECTED IN SOME WAY TO NOT JUST  
10:09AM 18 LOOK AT THE OATH THAT THEY HAVE TAKEN, BUT ALSO TO LOOK AT  
10:09AM 19 CONSEQUENCES OF THEIR DECISION IN A WAY THAT IS INAPPROPRIATE  
10:09AM 20 THAT REFERENCES PUNISHMENT.

10:09AM 21 AND I THINK LAWYERS HAVE -- DEFENSE LAWYERS, AS YOU KNOW,  
10:09AM 22 I DON'T WANT TO SAY "STRUGGLED," BUT HAVE DEALT WITH THIS ISSUE  
10:09AM 23 OVER THE DECADES. HOW MUCH CAN WE SAY? AND WHAT SHOULD WE  
10:09AM 24 STAY AWAY FROM?

10:09AM 25 SO I APPRECIATE YOUR COMMENTS. I RECOGNIZE THE

1 GOVERNMENT'S COMMENTS. AND I RECOGNIZE YOUR COMMITMENT, YOUR  
2 TEAM'S COMMITMENT THROUGH RECOGNIZING THAT IT'S INAPPROPRIATE  
3 TO PUT PUNISHMENT IN FRONT OF THE JURY EITHER IN AN OPENING  
4 STATEMENT OR A CLOSING ARGUMENT, AND I'LL HOLD YOUR TEAM TO  
5 THAT.

6 UNLESS THERE'S ANYTHING FURTHER FROM MR. SCHENK?

7 MR. SCHENK: NO. SUBMIT IT, YOUR HONOR.

8 THE COURT: ANYTHING FURTHER?

9 MS. ROPER: THANK YOU, YOUR HONOR.

10 THE COURT: I WILL GRANT THE MOTION. I WILL GRANT  
11 THE MOTION AS TO THE DEFENSE IS NOT PERMITTED TO PUT PUNISHMENT  
12 DIRECTLY IN FRONT OF THE JURY. THAT'S NOT APPROPRIATE.

13 AND THE DEFENSE WILL, AND I BELIEVE THEY KNOW WHAT TO DO  
14 HERE, BUT THEY SHOULD CHOOSE THEIR PHRASING CAREFULLY WHEN  
15 MAKING COMMENTS AND CAUTIOUSLY WHEN TALKING ABOUT THE NATURE OF  
16 THE CASE.

17 I'M NOT GOING TO RULE SPECIFICALLY ON WHAT YOU CAN'T SAY  
18 THIS, AND THE CASE HAS SERIOUS CONCERNS FOR MY CLIENT. BUT I  
19 THINK YOU'VE HEARD ME COMMENT ON THIS.

20 AND I DO HAVE SOME CONCERNS ABOUT REFERENCE TO PUNISHMENT,  
21 SUBTLE OR NOT. A SUBTLE REFERENCE, AS MR. SCHENK POINTS OUT,  
22 IS NONETHELESS A REFERENCE.

23 SO I APPRECIATE YOUR TELLING ME THAT YOU KNOW HOW TO, AND  
24 YOUR TEAM, KNOW HOW TO CONDUCT YOURSELVES ON THIS.

25 ALL RIGHT. THANK YOU.

1 I THINK NEXT IS 588, GOVERNMENT'S MOTION IN LIMINE  
2 NUMBER 3, AND THIS IS TO PRECLUDE AN IMPROPER ADVICE-OF-COUNSEL  
3 DEFENSE.

4 MR. SCHENK, YOU HAVE THIS ONE AS WELL.

5 MR. SCHENK: I DO, YOUR HONOR. THANK YOU.

6 WHEN THE COURT BEGAN THIS MORNING WITH THE INTRODUCTORY  
7 COMMENTS THAT NOTED THAT THERE MIGHT BE SOME MOTIONS THAT IT  
8 WOULD CHOOSE TO DEFER RULING ON, AND AT THE RISK OF CONCEDED  
9 TOO MUCH, MAYBE THIS IS ONE THAT THE COURT WOULD CONSIDER  
10 DEFERRING RULING ON.

11 THE GOVERNMENT REALLY IS ASKING FOR TWO THINGS HERE, AND  
12 THEY BOTH INVOLVE STATEMENTS THAT ATTORNEYS MADE.

13 THE FIRST IS AN ORDER FROM THE COURT PRECLUDING MS. HOLMES  
14 FROM OFFERING TESTIMONY REGARDING STATEMENTS THAT ATTORNEYS  
15 MADE DURING THE COURSE OF THE TRIAL. THERE ARE DIFFERENT RULES  
16 OF EVIDENCE TO ADMIT STATEMENTS IF THE GOVERNMENT WAS OFFERING  
17 THEM IN THEIR CASE-IN-CHIEF VERSUS THE DEFENSE, BUT  
18 ADDITIONALLY, THE DEFENSE CONTINUES TO MAINTAIN PRIVILEGE  
19 EXISTS BETWEEN HER AND MANY LAWYERS. AND IT'S CERTAINLY HER  
20 RIGHT, AND WE DON'T OBJECT TO THAT EXCEPT, AS THE COURT KNOWS,  
21 THERE'S A PENDING MOTION BEFORE JUDGE COUSINS ON THAT ISSUE.

22 BUT LEAVING THAT ASIDE, WHAT WE'RE CONCERNED ABOUT IS  
23 SWORD AND SHIELD. IT CAN'T BOTH BE THE CASE THAT A PRIVILEGE  
24 IS MAINTAINED AND THAT LAWYERS OR STATEMENTS LAWYERS HAVE MADE  
25 ARE SOLICITED FOR THE BENEFIT OF THE JURY, FOR THE JURY TO

1 HEAR, AND THAT'S WHY WE WANTED TO BRIEF THE ISSUE AND RAISE IT  
2 FOR THE COURT BECAUSE IT SHOULDN'T WORK BOTH WAYS. A LANE  
3 SHOULD BE CHECKED.

4 THE SECOND, AND I WOULD ADVOCATE EVEN AMONG THESE TWO, THE  
5 ONE THAT IS MORE APPROPRIATE FOR THE COURT TO DEFER RULING ON  
6 IS THE ONE INVOLVING JURY INSTRUCTIONS AND WHETHER MS. HOLMES  
7 GETS AN INSTRUCTION REGARDING GOOD FAITH OR WHAT IS SOMETIMES  
8 CALLED ADVICE OF COUNSEL. AND IT'S TRUE THAT THE CASES  
9 CERTAINLY SUGGEST THAT THE COURT SHOULD WAIT TO DETERMINE JURY  
10 INSTRUCTIONS UNTIL IT HEARS EVIDENCE, AND WE DON'T DISPUTE THAT  
11 AT ALL.

12 WHAT WE NOTE ONLY IS THAT OFTEN THE CASES THAT SUPPORT  
13 GIVING EITHER GOOD FAITH OR ADVICE OF COUNSEL DO SO AFTER THE  
14 DEFENSE MEETS CERTAIN ELEMENTS. FULL DISCLOSURE TO THE LAWYER  
15 BY THE DEFENDANT REGARDING THE FACTS AND CIRCUMSTANCES AND THEN  
16 THOSE -- THAT DISCLOSURE LEADING TO CERTAIN ADVICE BEING GIVEN.

17 NONE OF THAT HAS BEEN PROVIDED TO THE GOVERNMENT YET.  
18 THERE'S BEEN NO NOTICE GIVEN TO THE GOVERNMENT. AND IT APPEARS  
19 THAT THE DEFENSE ISN'T PLANNING TO PURSUE AN ADVICE OF COUNSEL  
20 DEFENSE. FINE.

21 AGAIN, WE FILED A MOTION TO PROVIDE BENEFIT TO THE COURT  
22 SO THE COURT HAS THE BRIEFING AT THE TIME THAT THIS ISSUE  
23 SHOULD EVER BECOME RIPE. IT WOULD BE APPROPRIATE TO DEFER  
24 RULING CERTAINLY ON THE SECOND OF THOSE.

25 THE COURT: ALL RIGHT. THANK YOU.

10:13AM 1 MR. SCHENK: THANK YOU.

10:13AM 2 MR. WADE: GOOD MORNING, YOUR HONOR.

10:13AM 3 LANCE WADE FOR MS. HOLMES. IT'S NICE TO SEE YOU.

10:13AM 4 THE COURT: GOOD MORNING.

10:13AM 5 MR. WADE: THEY LET ME UP HERE FROM THE CHEAP SEATS  
10:13AM 6 TO ADDRESS THE COURT. I WILL DO IT BRIEFLY.

10:13AM 7 WE AGREE WITH THE GOVERNMENT THAT THEY SHOULD BE DEFERRED  
10:14AM 8 OR WHATEVER THE LAW IS WITH RESPECT TO THE ADVICE OF COUNSEL  
10:14AM 9 INSTRUCTION. I THINK WE ALL RECOGNIZE THAT LAWYER EVIDENCE MAY  
10:14AM 10 BE IN THIS CASE, AND WE SHOULD DEAL WITH THAT AS IT COMES.

10:14AM 11 IF YOU HAVE ANY QUESTIONS, I'M HAPPY TO ADDRESS IT.

10:14AM 12 THE COURT: NO. ALL RIGHT. WELL, THE ONLY QUESTION  
10:14AM 13 I HAD IS, MR. WADE, THESE ARE THE FEWEST WORDS THAT YOU HAVE  
10:14AM 14 SPOKEN IN THIS CASE. I'LL JUST MAKE THAT OBSERVATION.

10:14AM 15 (LAUGHTER.)

10:14AM 16 MR. WADE: WE'RE OFF TO AN AUSPICIOUS START,  
10:14AM 17 YOUR HONOR.

10:14AM 18 THE COURT: THANK YOU VERY MUCH.

10:14AM 19 ANYTHING FURTHER, MR. SCHENK?

10:14AM 20 MR. SCHENK: NO, YOUR HONOR.

10:14AM 21 THE COURT: WELL, I APPRECIATE YOU FILING THIS  
10:14AM 22 MOTION AND DRAWING THE ISSUE TO THE COURT'S ATTENTION. WHETHER  
10:14AM 23 OR NOT THE, AS IT'S PHRASED, THE ATTORNEY ADVICE OR VICE OF  
10:14AM 24 ATTORNEY DEFENSE IS GOING TO BE ADVANCED OR NOT IS YET TO BE  
10:14AM 25 KNOWN.

1 I THINK MR. WADE TELLS US THAT HIS TEAM UNDERSTANDS THE  
2 PREREQUISITES FOR DOING SO. MY SENSE IS THAT IF THEY INTEND TO  
3 ADVANCE THAT, THAT THEY'LL MEET THE PREREQUISITES.

4 THANK YOU, COUNSEL, FOR POINTING OUT THAT THIS IS AN  
5 APPROPRIATE MOTION TO DEFER. THE COURT WILL DEFER ITS RULING  
6 ON THE GOVERNMENT'S MOTION PENDING EVIDENCE OTHERWISE THAT  
7 SUPPORTS IT. OKAY. THANK YOU.

8 LET'S MOVE TO THIS IS MS. HOLMES'S MOTION. THIS IS DOCKET  
9 563. AND I ALSO BELIEVE THAT IT TOUCHES ON THE GOVERNMENT'S  
10 MOTION IN LIMINE NUMBER 10. IT SEEMS LIKE THESE TWO MAY HAVE  
11 SOME CROSSOVER ISSUES. BUT LET'S TURN TO 563. THIS IS  
12 MS. HOLMES'S MOTION TO EXCLUDE EVIDENCE OF ANECDOTAL TEST  
13 RESULTS.

14 MS. SAHARIA: GOOD MORNING, YOUR HONOR.

15 MR. WADE IS ACTUALLY GOING TO BE THE ONE TO ADDRESS THIS  
16 MOTION, BUT AS YOUR HONOR INDICATED EARLIER, THERE IS A LOT OF  
17 OVERLAP ACROSS THE DEFENSE MOTIONS AND THE GOVERNMENT MOTIONS,  
18 AND WE THOUGHT IT COULD BE HELPFUL TO SPEND A FEW MINUTES  
19 PROVIDING FACTUAL BACKGROUND THAT CROSSES ALL OF THE MOTIONS,  
20 WHICH I THINK WILL HELP SAVE SOME TIME IN INDIVIDUAL MOTIONS.

21 SO WITH THE COURT'S INDULGENCE, I THOUGHT I WOULD PROVIDE  
22 THAT IF THAT'S OKAY WITH YOU?

23 THE COURT: SURE. THAT'S FINE. THANK YOU.

24 MS. SAHARIA: SO MUCH OF THE GOVERNMENT'S CASE AND  
25 THE MOTIONS CONCERN THERANOS'S BLOOD TESTING SERVICES THAT IT



1 PROVIDED FROM LATE 2013 TO LATE 2016. SO I THOUGHT I WOULD  
2 JUST DESCRIBE HOW AT A HIGH LEVEL THOSE OPERATIONS OCCURRED AT  
3 THERANOS DURING THAT TIME.

4 THERANOS OPERATED TWO FEDERALLY CERTIFIED CLINICAL  
5 LABORATORIES. ONE IN ARIZONA AND ONE IN CALIFORNIA. THEY  
6 GENERALLY OPERATED IN THE FOLLOWING WAY:

7 BLOOD WOULD BE COLLECTED AT APPROXIMATELY 40 DIFFERENT  
8 LOCATIONS WHICH WERE PRIMARILY WALGREENS PHARMACIES.

9 THE BLOOD WAS COLLECTED IN TWO PRIMARY WAYS DEPENDING ON  
10 WHICH ASSAY WAS GOING TO BE CONDUCTED AND OTHER FACTORS.

11 BLOOD WOULD SOMETIMES BE DRAWN FROM THE VEIN USING  
12 TRADITIONAL VENOUS COLLECTION WITH A NEEDLE.

13 SOMETIMES BLOOD WOULD BE COLLECTED FROM A FINGERSTICK.

14 THE BLOOD WOULD THEN BE TRANSPORTED FROM THAT COLLECTION  
15 SITE TO ONE OF THOSE TWO LABORATORIES.

16 THE TESTING OF THE BLOOD THEN OCCURRED IN ONE OF THREE  
17 PRINCIPAL WAYS, AND WE'RE GOING TO TALK A LOT ABOUT THOSE THREE  
18 WAYS OVER THE COURSE OF THESE ARGUMENTS.

19 THE FIRST IS THAT SOME ASSAYS WERE RUN ON TRADITIONAL  
20 COMMERCIAL DEVICES THAT THERANOS PURCHASED FROM THIRD PARTIES.  
21 YOU'LL HEAR THESE REFERRED TO AS COMMERCIAL DEVICES OR PERHAPS  
22 FDA APPROVED DEVICES, AND THAT SIMPLY MEANS THAT THE FDA  
23 APPROVED THAT THIRD PARTY MANUFACTURER TO SELL ITS DEVICES TO  
24 OTHER COMPANIES LIKE THERANOS. SO THAT'S WAY NUMBER ONE THAT  
25 BLOOD WAS TESTED.

10:17AM 1 THE SECOND WAY IS THAT THERANOS USED ITS OWN PROPRIETARY  
10:18AM 2 ANALYZERS TO TEST BLOOD AS LABORATORY DEVELOPED TESTS THAT IT  
10:18AM 3 DEVELOPED ITSELF. AND WE CALL THOSE DEVICES TSPU'S. THAT  
10:18AM 4 STANDS FOR THERANOS SAMPLE PROCESSING UNIT.

10:18AM 5 SO IF YOU HEAR THE TERM TSPU, THAT REFERS TO THERANOS'S  
10:18AM 6 OWN PROPRIETARY ANALYZER.

10:18AM 7 AND THEN THE THIRD WAY, AND ONE OF OUR MOTIONS CONCERNS  
10:18AM 8 THIS WAY, IS THAT SOME TESTING OCCURRED ON COMMERCIAL DEVICES  
10:18AM 9 AT ANOTHER COMPANY MANUFACTURED THAT PERMITS THE USER TO MAKE  
10:18AM 10 MODIFICATIONS TO THOSE DEVICES TO DEPLOY THEIR OWN LABORATORY  
10:18AM 11 DEVELOPED TESTS.

10:18AM 12 THERANOS USED LABORATORY DEVELOPED TESTS ON THOSE DEVICES  
10:18AM 13 THAT ALLOWED IT TO TEST SMALLER SAMPLES OF BLOOD ON THOSE  
10:18AM 14 DEVICES.

10:18AM 15 NOW, WHICH OF THOSE THREE METHODS WAS USED DEPENDED ON  
10:18AM 16 DIFFERENT FACTORS AND WHICH CHANGED OVER TIME AND THOSE THREE  
10:19AM 17 FACTORS -- THERE ARE THREE PRIMARY FACTORS. ONE WAS THE  
10:19AM 18 LOCATION WHERE THE BLOOD WAS TESTED.

10:19AM 19 IN THERANOS'S ARIZONA LAB, ONLY COMMERCIAL DEVICES WERE  
10:19AM 20 USED, SO ONLY THAT FIRST METHOD COULD BE USED IN THE ARIZONA  
10:19AM 21 LABORATORY.

10:19AM 22 BUT IN THE CALIFORNIA LABORATORY ALL THREE METHODS WERE  
10:19AM 23 USED.

10:19AM 24 HOW THE BLOOD WAS DRAWN COULD AFFECT HOW IT WOULD BE  
10:19AM 25 TESTED. SO IF BLOOD WAS DRAWN THROUGH THE VENOUS METHOD AS

1 OPPOSED TO THE FINGERSTICK METHOD, THAT COULD AFFECT WHICH KIND  
2 OF DEVICE THE BLOOD WAS TESTED ON.

3 AND THEN THE THIRD IS THAT SOME ASSAYS -- YOU KNOW, AN  
4 ASSAY COULD BE SOMETHING LIKE A GLUCOSE TEST OR A CALCIUM TEST.  
5 WE'LL TALK A LOT ABOUT DIFFERENT ASSAYS DURING THE COURSE OF  
6 THESE HEARINGS. WHICH ASSAY WAS ORDERED BY THE DOCTOR COULD  
7 AFFECT HOW IT WAS TESTED. SOME ASSAYS WERE ONLY RUN ON THE  
8 COMMERCIAL MACHINE, AND SOME ASSAYS COULD BE RUN ON ALL THREE  
9 KINDS OF MACHINES, AND WHICH ONE WAS USED WOULD VARY OVER TIME  
10 FOR THOSE DIFFERENT ASSAYS.

11 DETAILED INFORMATION ABOUT ALL OF THE TEST RESULTS  
12 INCLUDING WHICH OF THOSE DEVICES AND METHODS WAS USED TO TEST  
13 EVERY SINGLE SAMPLE OF BLOOD WAS STORED IN THERANOS'S  
14 LABORATORY INFORMATION SYSTEMS DATABASE CALLED THE LIS  
15 DATABASE. AND MR. WADE IS GOING TO DISCUSS THAT IN MORE DETAIL  
16 TODAY.

17 SO WITH THAT VERY GENERAL BACKGROUND ABOUT THAT PART OF  
18 THERANOS'S OPERATIONS, LET ME TURN TO THE RELEVANT ALLEGATIONS  
19 IN THE INDICTMENT.

20 THE THIRD SUPERSEDING INDICTMENT ALLEGES THAT MS. HOLMES  
21 MADE FALSE STATEMENTS ABOUT THERANOS'S PROPRIETARY ANALYZER,  
22 THAT'S THE SECOND METHOD THAT I TALKED ABOUT, AS WELL AS THE  
23 ACCURACY AND RELIABILITY OF THERANOS'S TESTS, WHEN, IN FACT,  
24 ACCORDING TO THE GOVERNMENT THERANOS'S PROPRIETARY ANALYZER HAD  
25 ACCURACY AND RELIABILITY PROBLEMS. THAT'S PARAGRAPH 12(A) OF

1 THE INDICTMENT. AND THERANOS'S TECHNOLOGY WAS NOT CAPABLE OF  
2 CONSISTENTLY PRODUCING ACCURATE AND RELIABLE RESULTS. THAT'S  
3 PARAGRAPH 16 OF THE INDICTMENT.

4 IN PARTICULAR, THE GOVERNMENT IDENTIFIES IN THE INDICTMENT  
5 23 ASSAYS FOR WHICH IT ALLEGES THAT THERANOS WAS NOT CAPABLE OF  
6 CONSISTENTLY PRODUCING ACCURATE AND RELIABLE RESULTS.

7 IF I COULD HAVE THE ELMO TURNED ON, I JUST WANT TO PROVIDE  
8 CONTEXT FOR THESE 23 ASSAYS SO THE COURT UNDERSTANDS HOW THE  
9 DIFFERENT MOTIONS RELATE TO EACH OTHER.

10 THE COURT: HAS THE GOVERNMENT SEEN THIS SLIDE  
11 PREVIOUSLY?

12 MS. SAHARIA: THEY HAVE NOT, BUT I DO HAVE A COPY TO  
13 HAND TO THEM.

14 THE COURT: GREAT. THANK YOU.

15 MS. SAHARIA: SO AS CONTEXT, YOUR HONOR, DURING THE  
16 RELEVANT PERIOD THERANOS PERFORMED MORE THAN 200 DIFFERENT  
17 ASSAYS, AND SO THOSE 200 ASSAYS ARE REPRESENTED BY THE GREEN  
18 CIRCLE. AND THE GOVERNMENT'S INDICTMENT IDENTIFIES 23 OF THEM,  
19 SO ABOUT 10 PERCENT THAT IT ALLEGES THERANOS COULD NOT PERFORM  
20 CONSISTENTLY ACCURATE AND RELIABLE RESULTS. SO THAT'S THIS  
21 BLUE CIRCLE HERE (INDICATING).

22 NOW, I THINK AS YOUR HONOR NOTICED FROM THE MOTIONS, THE  
23 GOVERNMENT RETAINED AN EXPERT, DR. STEVEN MASTER, AND ASKED HIM  
24 TO OPINE THAT THERANOS WAS NOT CAPABLE OF CONSISTENTLY  
25 PRODUCING ACCURATE RESULTS FOR 10 OF THE 23. SO THAT'S THIS

1 RED CIRCLE HERE (INDICATING). SO WE'VE GONE FROM 200 DOWN TO  
2 23 AND THEN DOWN TO 10.

3 I THINK AS YOUR HONOR KNOWS AS TO THE MOTIONS, DR. MASTER  
4 WAS UNABLE TO OFFER THAT OPINION AND HE OPINED ONLY THAT  
5 THERANOS COULD NOT PRODUCE ACCURATE AND RELIABLE RESULTS FOR  
6 OF THOSE ASSAYS. SO WE'VE NARROWED IT DOWN TO 6 OUT OF THE  
7 TOTAL OF 200 PERFORMED AND 23 IDENTIFIED IN THE INDICTMENT.

8 I'M GOING TO DISCUSS TOMORROW THE FLAWS IN HIS OPINIONS AS  
9 TO THOSE 6, BUT IT'S UNCLEAR HOW THE GOVERNMENT INTENDS TO  
10 PROVE ITS ALLEGATIONS FOR THESE REMAINING 17 GIVEN THAT  
11 DR. MASTER HAS NOT PRODUCED AN OPINION FOR THOSE.

12 NOW, THE GOVERNMENT HAS ALSO DISCLOSED NINE MEDICAL  
13 PROFESSIONALS AS EXPERTS TO TALK ABOUT THEIR TESTS THEIR  
14 INDIVIDUAL PATIENTS RECEIVED, ALTHOUGH IN MANY CASES THEY HAVE  
15 FAILED TO IDENTIFY THOSE PATIENTS. MY COLLEAGUE, MS. KATHERINE  
16 TREFZ, IS GOING TO DISCUSS THAT WITH US TODAY.

17 THE GOVERNMENT CONCEDES THAT THOSE WITNESSES CANNOT OPINE  
18 THAT THERANOS WAS UNABLE TO PRODUCE ACCURATE AND RELIABLE  
19 RESULTS BECAUSE THEY'RE NOT QUALIFIED TO OFFER THAT OPINION.

20 INSTEAD, THE GOVERNMENT WANTS THEM JUST DESCRIBE  
21 PARTICULAR OCCASIONS WHEN THEIR PATIENTS RECEIVED THE TEST  
22 RESULT.

23 NOW, ONE POINT THAT I DON'T REALLY THINK COMES ACROSS IN  
24 THE MOTIONS BUT I THINK IT'S IMPORTANT FOR THE COURT TO  
25 UNDERSTAND IS THAT OUT OF THOSE NINE MEDICAL PROFESSIONALS,

10:24AM 1 ONLY ONE HAS A PATIENT WHO RECEIVED A TEST WITHIN THESE SIX  
10:24AM 2 ASSAYS FOR WHICH DR. MASTER OFFERS AN OPINION. THE REST OF  
10:24AM 3 THOSE NINE MEDICAL PROFESSIONALS HAD PATIENTS WHO RECEIVED  
10:24AM 4 OTHER TESTS.

10:24AM 5 SOME RECEIVED TESTS IN THESE 10, SOME RECEIVED TESTS OUT  
10:24AM 6 HERE IN THESE 23, AND SOME EVEN RECEIVED TESTS OUT HERE THAT  
10:24AM 7 ARE NOT EVEN IDENTIFIED IN THE INDICTMENT (INDICATING).

10:24AM 8 FOR THOSE MEDICAL PROFESSIONALS, IT'S ALSO UNCLEAR HOW THE  
10:24AM 9 GOVERNMENT INTENDS TO PROVE THAT THOSE ASSAYS WERE ACCURATE AND  
10:24AM 10 RELIABLE SINCE THEY CONCEDE THAT THEY CANNOT PROVIDE THAT  
10:24AM 11 OPINION.

10:24AM 12 NOW, THE CONCEPT OF ACCURACY AND RELIABILITY OF BLOOD  
10:25AM 13 TESTS ARE A SCIENTIFIC CONCEPT. THAT'S CLEAR FROM THE REPORT  
10:25AM 14 OF DR. MASTER. AND WHEN THE GOVERNMENT BRINGS A SCIENTIFIC  
10:25AM 15 CASE, YOU WOULD EXPECT IT TO CONDUCT A SCIENTIFIC  
10:25AM 16 INVESTIGATION. YOU WOULD EXPECT IT TO SECURE THE RELEVANT DATA  
10:25AM 17 AND EVIDENCE, TO ENGAGE SCIENTISTS, AND TO CONDUCT A  
10:25AM 18 SCIENTIFICALLY VALID REVIEW OF THE DATA AND THE EVIDENCE.

10:25AM 19 THE GOVERNMENT INEXPLICABLY DID NONE OF THAT. NOT BEFORE  
10:25AM 20 IT INDICTED MS. HOLMES, NOT AFTER IT INDICTED MS. HOLMES. AT  
10:25AM 21 BEST, IT WENT THROUGH THE MOTIONS OF DOING THOSE THINGS, BUT  
10:25AM 22 ONLY IN THE MOST CURSORY FASHION AS WE WILL DISCUSS IN THE  
10:25AM 23 VARIOUS ARGUMENTS.

10:25AM 24 THE GOVERNMENT'S LACK OF DATA AND ITS LACK OF ANALYSIS  
10:25AM 25 HAVE LED TO A GIGANTIC HOLE IN ITS CASE, AND IT IS TRYING TO

10:25AM 1 FILL THAT HOLE WITH NONSCIENTIFIC EVIDENCE, AND THAT IS THE  
10:25AM 2 REASON FOR MANY OF OUR MOTIONS.

10:25AM 3 TODAY WE ARE GOING TO DISCUSS THE FOLLOWING CATEGORIES OF  
10:26AM 4 NONSCIENTIFIC EVIDENCE:

10:26AM 5 ANECDOTES REGARDING INCORRECT TEST RESULTS, AND ANY TINY  
10:26AM 6 FRACTION OF THE 7 TO 10 MILLION TEST RESULTS GENERATED BY  
10:26AM 7 THERANOS, THAT'S 563, WHICH MR. WADE WILL ADDRESS FIRST;

10:26AM 8 ACCOUNTS OF THOSE ANECDOTAL RESULTS BY MEDICAL  
10:26AM 9 PROFESSIONALS, ECF 561;

10:26AM 10 TESTIMONY ABOUT SUPPOSED VIOLATIONS OF FEDERAL REGULATIONS  
10:26AM 11 THAT THE GOVERNMENT DID NOT CHARGE IN THIS CASE, ECF 569; AND,

10:26AM 12 SPREADSHEETS FOR COUNTING CUSTOMER COMPLAINTS THAT  
10:26AM 13 MS. HOLMES NEVER SAW, ECF 570.

10:26AM 14 TOMORROW WE WILL DISCUSS THE UNRELIABLE OPINIONS BY  
10:26AM 15 DR. MASTER THAT RESTS ON EMAILS AND THAT APPLY NO DISCLOSED  
10:26AM 16 METHODOLOGY, ECF 560;

10:26AM 17 THE RESULTS OF REGULATORY INSPECTIONS THAT DID NOT ASSESS  
10:26AM 18 WHETHER THERANOS'S TESTS WERE INACCURATE AND RELIABLE, ECF 573,  
10:27AM 19 574, AND 575; AND,

10:27AM 20 THERANOS'S PROPHYLACTIC REMEDIAL DECISION TO VOID SOME OF  
10:27AM 21 ITS TEST RESULTS, ECF 572.

10:27AM 22 IT HAS ALSO BECOME CLEAR THAT THE GOVERNMENT INTENDS TO  
10:27AM 23 DISTRACT THE JURY FROM ITS HOLE IN THIS CASE BY TURNING THE  
10:27AM 24 TRIAL INTO A TRIAL ABOUT OTHER THINGS.

10:27AM 25 TODAY WE WILL DISCUSS ITS INTENT TO INFLAME THE JURY WITH

10:27AM 1 HYPOTHETICAL ACCOUNTS OF LIFE THREATENING HARM THAT NEVER  
10:27AM 2 HAPPENED TO ANY THERANOS CUSTOMER, ECF 562;  
10:27AM 3 THEN THURSDAY WE WILL TALK ABOUT ITS FOCUS ON MS. HOLMES'S  
10:27AM 4 ALLEGED SPENDING, ECF 567;  
10:27AM 5 SUPPOSED CULTURE OF SECRECY THAT AFFECTS NORMAL CORPORATE  
10:27AM 6 PRACTICES, ECF 566 AND 576;  
10:27AM 7 IRRELEVANT MEDIA COVERAGE OF THERANOS, ECF 578; AND,  
10:27AM 8 THE GOVERNMENT'S INTENT TO PRESENT EVIDENCE THAT HAS NO  
10:28AM 9 CONNECTION TO MS. HOLMES, EVIDENCE OF SUPPOSED BAD ACTS OR  
10:28AM 10 FALSE STATEMENTS BY RANDOM THERANOS EMPLOYEES, 575.  
10:28AM 11 ABSENT STRICT CONTROL BY THIS COURT OVER THE SCOPE OF THE  
10:28AM 12 GOVERNMENT'S CASE, THIS TRIAL IS GOING TO BE A SPRAWLING MESS  
10:28AM 13 OF IRRELEVANT, PREJUDICIAL EVIDENCE AND THE GOVERNMENT WILL  
10:28AM 14 INJECT ERROR INTO THIS CASE.  
10:28AM 15 SO WITH THAT INTRODUCTION, I'M GOING TO TURN IT OVER TO  
10:28AM 16 MR. WADE.  
10:28AM 17 THE COURT: THANK YOU.  
10:28AM 18 MS. SAHARIA: WOULD YOUR HONOR LIKE A COPY OF THIS?  
10:28AM 19 THE COURT: I WOULD. THANK YOU.  
10:28AM 20 MS. SAHARIA: (HANDING.)  
10:28AM 21 THE COURT: MR. WADE, YOU'RE SPEAKING TO 563.  
10:28AM 22 MR. WADE: I'M SPEAKING TO 563 AND THE GOVERNMENT'S  
10:28AM 23 MOTION IN LIMINE NUMBER 10 THERE.  
10:28AM 24 I BELIEVE THEY'RE SUBSTANTIALLY OVERLAPPING. AND I WILL  
10:28AM 25 PICK UP WHERE MS. SAHARIA LEFT OFF AND FOCUS ON THE BREADTH OF



1 THE GOVERNMENT'S CONSPIRACY AND THE CONTENTIONS IN THIS CASE  
2 WHICH ARE AS BROAD OF CONTENTIONS AS I'VE SEEN IN A CRIMINAL  
3 CASE IN A FEDERAL COURT AMOUNTING ESSENTIALLY TO A PRODUCTS  
4 LIABILITY CASE OR A BREACH OF WARRANTY CASE.

5 THE GOVERNMENT CONTENDS THAT THERANOS WAS NOT CAPABLE OF  
6 CONSISTENTLY PRODUCING ACCURATE AND RELIABLE RESULTS. AS WE'VE  
7 JUST SAW FROM MS. SAHARIA'S DEMONSTRATIVE, THAT IS A SWEEPING  
8 ALLEGATION THAT AFFECTS A MASSIVE SCOPE OF CONDUCT WITHIN A  
9 COMPANY.

10 THERANOS PERFORMED TESTS FOR MORE THAN TWO YEARS. IT  
11 PERFORMED MORE THAN 200 DIFFERENT ASSAYS. THOSE ASSAYS RAN ON  
12 ALL KINDS OF DIFFERENT MACHINES, AS MS. SAHARIA JUST MENTIONED,  
13 AND LABS IN TWO DIFFERENT STATES, AND IN ALL, THERANOS  
14 PERFORMED BETWEEN 7 AND 10 MILLION TESTS.

15 THE GOVERNMENT'S CASE HERE IS THE PROVERBIAL -- THE  
16 EVIDENCE THAT THEY MOVE FORWARD IS EVIDENCE OF FALSITY WITH  
17 RESPECT TO THAT CLAIM, THAT BROAD CLAIM, WHICH RELATES TO ALL  
18 OF THERANOS TESTING.

19 IF YOU LOOK AT THEIR BILL OF PARTICULARS, THEIR ALLEGED  
20 MISREPRESENTATIONS, MANY OF THEM COVER ALL OF THAT TESTING.  
21 THEIR CASE AGAINST THOSE 7 TO 10 MILLION TESTS, THEY SEEK TO  
22 OFFER TESTIMONY OF 11 PATIENTS. IT IS THE PROVERBIAL ONE IN A  
23 MILLION, YOUR HONOR.

24 THEY OFFER THAT WITHOUT OFFERING A SCIENTIFIC BASIS TO  
25 SUGGEST THAT THAT EVIDENCE IS RELEVANT. IN ORDER FOR THE

1 EVIDENCE TO BE RELEVANT, THEY HAVE TO ESTABLISH THAT THERANOS'S  
2 TECHNOLOGY WAS RESPONSIBLE FOR THE ERRONEOUS RESULT. THEY  
3 CAN'T DO THAT.

4 JUST BECAUSE AN ERRONEOUS RESULT HAPPENED DOES NOT MEAN  
5 THAT IT WAS A RESULT OF THERANOS TECHNOLOGY. THEY NEED TO  
6 ESTABLISH A CAUSAL RELATIONSHIP BETWEEN THE TECHNOLOGY AND THE  
7 RESULT.

8 AS YOUR HONOR WELL KNOWS, AND WE'VE ALL BECOME VERY  
9 FAMILIAR WITH TESTING OVER THE LAST 15 MONTHS OR SO, TESTING IS  
10 A DYNAMIC PROCESS. IT INVOLVES MANY DIFFERENT VARIABLES. SOME  
11 OF THOSE RELATE TO THE TECHNOLOGY. MANY OF THEM RELATE TO  
12 OTHER THINGS WITHIN THE TESTING PROCESS, SOME OF WHICH HAVE  
13 NOTHING TO DO WITH THERANOS LIKE THE PATIENT, THEIR MEDICAL  
14 CONDITION, THEIR MEDICINE, THEIR DIET. ALL OF THOSE THINGS CAN  
15 CREATE AN ERRONEOUS RESULT.

16 SO BY SUGGESTING, BY WANTING TO BRING FORWARD ANECDOTES,  
17 STATISTICALLY INSIGNIFICANT ANECDOTES, THE GOVERNMENT IS TRYING  
18 TO CREATE THE IMPRESSION WITH THE JURY THAT THOSE ANECDOTES ARE  
19 A DEMONSTRATION OF THERANOS'S INABILITY TO CONSISTENTLY PRODUCE  
20 ACCURATE AND RELIABLE RESULTS.

21 NOW, THE -- WE'VE CITED AT DOCKET 563 AT 4 SOME SCIENTIFIC  
22 LITERATURE THAT TALKS ABOUT LAB ERROR RATES. ERRORS HAPPEN  
23 EVERY DAY IN VIRTUALLY EVERY LAB. THERE ARE ERRORS HAPPENING  
24 PROBABLY AS WE SPEAK GIVEN THE VOLUME OF TESTING THAT IS  
25 HAPPENING IN THIS COUNTRY. THERE'S A KNOWN ERROR RATE IN THE

1 LITERATURE OF BETWEEN .1 PERCENT AND 3 PERCENT.

2 UNDER THOSE ERROR RATES, WHICH THE GOVERNMENT HAS NOT  
3 CONTESTED, AND, FRANKLY, WE BELIEVE ARE CONSERVATIVE WITHIN THE  
4 LITERATURE THAT WE'VE REVIEWED, YOU WOULD EXPECT TO SEE BASED  
5 ON A VOLUME OF 7 TO 10 MILLION TESTS, BETWEEN 700,000 AND  
6 210,000 ERRORS.

7 CONSIDERATION OF THOSE FACTS DEMONSTRATE THE  
8 INSIGNIFICANCE OF THE EVIDENCE THAT IS OFFERED BY THE  
9 GOVERNMENT IN THIS CASE.

10 THE GOVERNMENT STATISTICALLY BY OFFERING 11 OF 7 TO  
11 10 MILLION, THEY'RE SEEKING TO OFFER BETWEEN 1 AND 2000THS OF  
12 1 PERCENT.

13 I HAD TO ASK MS. SAHARIA WHO HAS MORE EXPERTISE IN MATH  
14 WHAT THAT MEANT FOR THE RECORD. THAT'S .000001571. THEY DO  
15 THAT -- STATISTICALLY THAT'S CLEARLY INSIGNIFICANT. THEY  
16 COULDN'T CREDIBLY OFFER ANY SUGGESTION OTHERWISE.

17 THEY OFFER THIS EVIDENCE WITH RESPECT TO A VARIETY OF  
18 DIFFERENT TESTS. AS BEST WE CAN TELL, THE GOVERNMENT DOESN'T  
19 EVEN KNOW FOR EACH INDIVIDUAL TEST HOW THE TEST WAS RUN, THE  
20 METHOD -- MS. SAHARIA JUST WENT THROUGH ALL OF THE STEPS IN THE  
21 PROCESS: THE METHOD THAT WAS USED, THE MACHINE THAT IT WAS RUN  
22 ON, THE LAB THAT IT WAS PERFORMED AT, AND ALL OF THE OTHER  
23 VARIABLES THAT ARE INVOLVED IN A TEST.

24 IT'S NOT EVEN CLEAR THAT THEY KNOW HOW MANY TESTS, FOR  
25 EXAMPLE, ON HCG, WHICH OFTEN RELATES TO PREGNANCY. IT'S NOT

1 CLEAR THAT THEY EVEN KNOW HOW MUCH HCG TESTS THERANOS RAN LET  
2 ALONE HOW MANY HCG TESTS THERANOS RAN WITHIN A PARTICULAR  
3 PERIOD THAT IS RELEVANT TO THE PATIENT THAT IS AT ISSUE OR ON  
4 THE MACHINE THAT IS RELEVANT TO THE PATIENT AT ISSUE.

5 SO THE STATISTICAL INSIGNIFICANCE OF THIS EVIDENCE IS  
6 BEYOND DISPUTE.

7 NOW, THE GOVERNMENT COULD POTENTIALLY CURE THAT IF THEY,  
8 IF THEY DID WHAT THEIR OWN EXPERTS SUGGEST.

9 SO AFTER WE POINTED OUT THE PROBLEM WITH THE ANECDOTAL  
10 EVIDENCE, THE GOVERNMENT WENT TO DR. MASTER AND THEY PROFFERED  
11 WITHIN THEIR OPPOSITION THAT IMPLICIT WITHIN HIS OPINION IS  
12 THAT CUSTOMERS -- CUSTOMER COMPLAINTS CAN BE RELEVANT.

13 BUT IF YOU LOOK AT WHAT DR. MASTER SAYS, AND THIS IS  
14 OFFERED DOCKET 668 AT 8, "IN DISCUSSING THE RELEVANCE THAT  
15 CUSTOMER COMPLAINTS HAVE ON ACCURACY AND RELIABILITY,  
16 DR. MASTER WOULD TESTIFY THAT PARTICULAR INCIDENTS," QUOTE,  
17 "'LED TO UNCOVERING SYSTEMIC OR PATIENT SPECIFIC ISSUES WITH A  
18 LABORATORY TEST,'" CLOSED QUOTE, "OR THAT THEY WERE," QUOTE,  
19 "'THEY WERE AWAY OF,'" QUOTE, "'IDENTIFYING UNRESOLVED ISSUES  
20 WITH INDIVIDUAL ASSAYS.'"

21 IN OTHER WORDS, HE WON'T SAY THAT THEY'RE RELEVANT IN AND  
22 OF THEMSELVES TO PROVE ACCURACY AND RELIABILITY. WHAT THEIR  
23 OWN EXPERT IS SAYING IS THAT IS A GATEWAY TO DO AN ANALYSIS TO  
24 ASSESS WHETHER IT'S RELEVANT TO A DETERMINATION AS TO WHETHER  
25 IT CAN BE OFFERED TO SHOW ACCURACY AND RELIABILITY.

10:36AM 1 THEY HAVEN'T DONE THAT. THEY HAVEN'T DONE THAT  
10:36AM 2 INVESTIGATION.

10:36AM 3 THE PRINCIPAL DEFICIENCY WITH RESPECT TO THEIR  
10:37AM 4 INVESTIGATIVE FUNCTION RELATES TO THEIR FAILURE TO OBTAIN THE  
10:37AM 5 LIS DATABASE. THIS IS A MASSIVE FAILURE OF PROOF ON BEHALF OF  
10:37AM 6 THE GOVERNMENT.

10:37AM 7 IF I COULD OFFER MY OWN DEMONSTRATIVE, AND I'LL OFFER ONE  
10:37AM 8 UP TO THE COURT. I'LL PUT ONE UP ON THE ELMO SO EVERYONE HAS  
10:37AM 9 THE BENEFIT OF IT.

10:37AM 10 THIS DEMONSTRATIVE JUST GIVES THE COURT A SENSE. I  
10:37AM 11 UNDERSTAND THAT SOMETIMES -- I DON'T WANT TO SPEAK ON BEHALF OF  
10:37AM 12 THE COURT, BUT AS I GET OLDER, WHAT A DATABASE IS AND WHAT IT  
10:37AM 13 MEANS HAS LESS AND LESS SIGNIFICANCE. SO I'VE HAD TO GROUND  
10:37AM 14 MYSELF IN THE FACTS A LITTLE BIT TO UNDERSTAND WHAT THE  
10:37AM 15 LIS DATABASE IS. IT'S NOT A DOCUMENT DATABASE THAT WE DEAL  
10:38AM 16 WITH IN COURT. IT'S A MULTI FACETTED TOOL THAT COLLECTS DATA  
10:38AM 17 THROUGHOUT THE TESTING PROCESS.

10:38AM 18 SO WHEN YOU LOOK AT, WHEN YOU LOOK AT THIS PROCESS, THE  
10:38AM 19 BLUE BOX IS DESIGNED TO DEMONSTRATE THE TESTING PROCESS AS A  
10:38AM 20 WHOLE, AND THE ARROWS SHOW THE WAY IN WHICH YOU WORK THROUGH  
10:38AM 21 THAT PROCESS.

10:38AM 22 SO THE CUSTOMER COMES IN AND PROVIDES ALL OF THIS  
10:38AM 23 INFORMATION THAT IS LOGGED WITHIN THE DATABASE. YOU KNOW  
10:38AM 24 THE -- YOU KNOW THEIR SPECIFIC DOCTOR, THEIR MEDICAL HISTORY,  
10:38AM 25 YOU GO THROUGH THE LOCATION, THE COLLECTION METHOD, WHAT

10:38AM 1 PHLEBOTOMIST WAS USED, THE TRANSPORTATION SPECIFIC INFORMATION  
10:38AM 2 WAS IN ARIZONA, IT WAS 110 DEGREES IN ARIZONA THAT DAY WHEN IT  
10:38AM 3 WAS SITTING ON THE TARMAC ON ITS WAY TO CALIFORNIA, FOR  
10:39AM 4 EXAMPLE.

10:39AM 5 YOU HAVE RECEIPT AND PROCESSING INFORMATION, WHEN IT WAS  
10:39AM 6 RECEIVED WITHIN THE LABORATORY. YOU HAVE -- AND THIS IS  
10:39AM 7 CRITICAL AND IT RELATES TO MANY OF THE -- MUCH OF THE EVIDENCE  
10:39AM 8 THAT THE GOVERNMENT WANTS TO OFFER ON THE DEVICE. WHEN YOU  
10:39AM 9 LOOK UNDER THE DEVICE HERE, YOU HAVE THE TYPE OF DEVICE USED;  
10:39AM 10 YOU HAVE ALL OF THE TESTS THAT WERE RUN; YOU HAVE THE QUALITY  
10:39AM 11 CONTROL DATA THAT RELATES TO THAT DEVICE ON THE DAY THAT TESTS  
10:39AM 12 WERE RUN; AND THEN, OF COURSE, YOU HAVE OTHER INFORMATION THAT  
10:39AM 13 RELATE TO ALL OF THE DIFFERENT RESULTS. AND YOU HAVE THIS NOT  
10:39AM 14 FOR ONE PATIENT, YOU HAVE IT FOR EVERY PATIENT.

10:39AM 15 SO IF THE GOVERNMENT IN CHOOSING TO OFFER A CASE ON  
10:39AM 16 ACCURACY AND RELIABILITY, THE STARTING POINT IS RIGHT HERE  
10:39AM 17 (INDICATING). IT'S THE 7 TO 10 MILLION TESTS THAT SHOW WHAT  
10:39AM 18 HAPPENED WITHIN THE LABS AT THERANOS ON WHICH DEVICES. WHICH  
10:40AM 19 ASSAYS? HOW MUCH WERE THERE?

10:40AM 20 WITHIN THE CONTEXT OF THE ISOLATED EXAMPLES, THE ANECDOTAL  
10:40AM 21 EXAMPLES, THEN THE QUESTION BECOMES WHAT DR. MASTER SAYS. WE  
10:40AM 22 HAVE A TEST THAT THE PATIENTS BELIEVE TO BE ERRONEOUS. WHAT IS  
10:40AM 23 THE CAUSAL -- WHAT IS THE CAUSE OF THAT?

10:40AM 24 LET ME GET ALL OF THE RELEVANT DATA AND ASSESS THE  
10:40AM 25 POTENTIAL CAUSES OF THAT OR RULE OUT THE CAUSES OF THAT.

10:40AM 1 THE GOVERNMENT DIDN'T DO THAT.

10:40AM 2 WITH RESPECT TO THE 23 ASSAYS, THE GOVERNMENT COULD HAVE  
10:40AM 3 GONE INTO THIS DATABASE, THEY COULD HAVE EXTRACTED OUT ALL OF  
10:40AM 4 THE TESTS THAT WERE RUN FOR ALL OF THOSE ASSAYS; THEY COULD  
10:40AM 5 HAVE HAD AN EXPERT REVIEW IT; THEY COULD HAVE LOOKED AT THE  
10:40AM 6 DEVICE THAT IT WAS RUN ON; THEY COULD HAVE LOOKED AT WHETHER  
10:40AM 7 THAT DEFICIENCY ACTUALLY RELATED TO THE THERANOS TECHNOLOGY.

10:41AM 8 THEY DIDN'T DO THAT.

10:41AM 9 SO WE DON'T EVEN KNOW. IT'S NOT CLEAR THAT THE GOVERNMENT  
10:41AM 10 KNOWS WHETHER THE PARTICULAR PATIENTS THAT THEY'RE SEEKING TO  
10:41AM 11 OFFER RAN THE TEST THAT WAS ON A THERANOS DEVICE VERSUS A MORE  
10:41AM 12 STANDARD FDA APPROVED TEST. IT'S NOT CLEAR THAT THEY'RE AWARE  
10:41AM 13 OF WHAT TEST IT WAS RUN ON MUCH LESS HOW MANY OTHER TESTS WERE  
10:41AM 14 RUN DURING THAT TIME PERIOD.

10:41AM 15 THE DEFICIENCIES HERE ARE TWOFOLD. ONE, THIS IS, AS THEIR  
10:41AM 16 OWN EXPERT SAYS WHEN HE TALKS ABOUT HOW YOU ASSESS INDIVIDUAL  
10:41AM 17 INSTANCES OF COMPLAINTS OR HOW YOU ASSESS ACCURACY AND  
10:41AM 18 RELIABILITY GENERALLY, YOU LOOK AT DATA, YOU LOOK AT -- YOU  
10:41AM 19 READ IT IN SCIENCE, YOUR EXPERTISE.

10:42AM 20 THIS FAILURE TO OBTAIN THIS EVIDENCE IS A GAPING HOLE IN  
10:42AM 21 THE GOVERNMENT'S CASE, BUT MORE FUNDAMENTALLY IT CREATES A  
10:42AM 22 SITUATION WHERE MS. HOLMES IS UNABLE TO CONFRONT MANY OF THE  
10:42AM 23 OTHERWISE INADMISSIBLE ANECDOTAL PIECES OF INFORMATION THAT THE  
10:42AM 24 GOVERNMENT NOW WANTS TO BRING FORWARD AND OFFER FOR THE TRUTH  
10:42AM 25 AND OFFER IT TO SUGGEST THAT THESE TESTS WERE INACCURATE AND

1 UNRELIABLE AND THAT THESE STATEMENTS IDENTIFIED IN THE BILL OF  
2 PARTICULARS WERE FALSE. THEY DEPRIVE HER OF THE ABILITY TO DO  
3 THAT INVESTIGATION.

4 INSTEAD, THEY WANT TO COME IN AND SAY, AND YOU'LL HEAR IT  
5 THROUGHOUT THESE THREE DAYS, THE CMS REPORT SAYS THIS, THERE'S  
6 A QC PROBLEM IN A COUPLE OF DAYS DURING THIS PERIOD ON THIS  
7 TEST, THAT'S EVIDENCE OF INACCURACY AND UNRELIABILITY. THAT'S  
8 A CONCLUSION REACHED BY A GOVERNMENTAL AGENCY IN AN ADVERSARIAL  
9 PROCESS. THAT'S OUR EVIDENCE OF -- TO PROVE THIS WRONG.

10 BUT IF YOU HAD THE DATA YOU COULD GO BACK AND LOOK AT ALL  
11 OF THE TESTS THAT WERE PERFORMED. YOU COULD ASSESS, FOR  
12 EXAMPLE, AN ISSUE THAT THE GOVERNMENT PUTS FORWARD REPEATEDLY  
13 AS FACT WHICH IS ACTUALLY IN DISPUTE, WHICH IS THERE'S A QC  
14 FAILURE. THAT SUGGESTS EVERYTHING IS INACCURATE AND  
15 UNRELIABILITY, OR UNRELIABLE.

16 AND THEY -- WELL, DID THEY PROVIDE RESULTS TO PATIENT?

17 WELL, THE GOVERNMENT SAYS YES BECAUSE CMS SAYS YES IN A  
18 HEARSAY STATEMENT THAT SHOULD BE INADMISSIBLE.

19 HOW DO WE KNOW WHETHER THEY ACTUALLY PROVIDED THOSE TESTS?  
20 IT'S IN THE LIS, YOUR HONOR.

21 ALL OF THE INFORMATION THAT RELATES TO HOW THE TESTS WERE  
22 PERFORMED, THE FREQUENCY, WHEN, THE QC, ALL OF THE GOODS WITH  
23 RESPECT TO TESTING ARE IN THERE.

24 NOW, YOU WOULD THINK IF THE GOVERNMENT WANTED TO CHOOSE TO  
25 CHARGE ONE OF THE BROADEST MAIL WIRE FRAUD CONSPIRACIES PERHAPS



1 THIS DISTRICT HAS SEEN IN TERMS OF THE BREADTH OF WHAT THEY'RE  
2 SAYING AND WITH RESPECT TO ACCURACY AND RELIABILITY, THEY WOULD  
3 AT LEAST GET THE DATA, BUT THEY DID NOT.

4 AND SO RECOGNIZING THEIR FAILURE YEARS LATER, THE  
5 GOVERNMENT HAS EMBARKED ON A LONG INVESTIGATION OF WHY IT CAN'T  
6 GET THAT DATA.

7 AND IT SAYS, WELL, OKAY, WE SHOULDN'T BE ABLE TO ARGUE  
8 THAT THEY FAILED TO MEET THEIR BURDEN, WHICH WOULD BE AN  
9 UNCONSTITUTIONAL LIMITATION ON MS. HOLMES.

10 AND THEY SHOULD BE ABLE TO PUT FORWARD EVIDENCE AS TO WHY  
11 THEY WEREN'T ABLE TO GET THAT WHEN IT'S NOT IN DISPUTE, OR AT  
12 LEAST IT SHOULDN'T BE AFTER WE'VE CLARIFIED THE RECORD IN OUR  
13 PLEADING, MS. HOLMES HAD NO ROLE WHATSOEVER IN THAT LIS ISSUE,  
14 WHETHER IT WAS A FAILURE TO PRESERVE OR A MISCOMMUNICATION,  
15 WHATEVER -- HOWEVER YOU WANT TO CATEGORIZE THAT ISSUE, THAT  
16 RELATED TO PEOPLE COMPLETELY SEPARATE FROM MS. HOLMES.

17 SO UNDER 404(B), UNDER 401, THAT IS JUST NOT RELEVANT TO  
18 THIS CASE. SO ALL OF THAT EVIDENCE AS TO WHY THEY COULDN'T --  
19 WHY THEY DIDN'T PROVE THEIR CASE IS OUT. IT SHOULD BE OUT,  
20 RESPECTFULLY.

21 THE EVIDENCE -- THE ACTUAL EVIDENCE OF THOSE EVENTS SHOW  
22 THAT THE GOVERNMENT MADE THIS ALLEGATION ABOUT ACCURACY AND  
23 RELIABILITY BEFORE THEY GOT THAT DATA AT ALL. THE RETURN DATE  
24 ON THE SUBPOENA WHEN THEY TRIED TO GET THE LIS DATA, THE RETURN  
25 DATE WAS JUNE 14TH, 2018. THAT WAS THE DAY THAT THEY RETURNED

1 AN INDICTMENT IN THIS CASE, THEIR FIRST INDICTMENT, AND IN  
2 WHICH THEY MADE THESE SAME ALLEGATIONS.

3 THEY NEVER HAD ANY INTENTION OF GOING TO LOOK AT THE  
4 LIS DATA. THEY DIDN'T EVEN MEANINGFULLY LOOK AT IT. IT WAS ON  
5 THE SHELF AT THE U.S.'S OFFICE FOR YEARS. THEY DIDN'T EVEN TRY  
6 TO ACCESS IT UNTIL MARCH OF 2020 AT WHICH POINT THEY MAY HAVE  
7 BROUGHT ALLEGATIONS THAT IT HAD BEEN IMPROPERLY DESTROYED WHEN  
8 THE FACTS ACTUALLY RESPECTFULLY WOULD SUGGEST OTHERWISE.

9 BUT WHAT IS NOT IN DISPUTE IS THAT THE GOVERNMENT KNEW  
10 ABOUT THE LIS DATA, KNEW ABOUT THE LIS, AND KNEW ABOUT THE  
11 LIS DATABASE IN DECEMBER 2016 WHEN COUNSEL FOR THERANOS MADE  
12 THEM AWARE OF WHAT THE LIS DATABASE WAS AND WHAT DATA WAS  
13 TRACKED IN THERE.

14 THEY HAD ACCESS TO EXPERTS AND THEY'RE WORKING WITH THE  
15 FDA AND CMS. EVERYONE KNOWS THAT A LAB HAS DATA. EVERYONE  
16 KNOWS THAT IT TRACKS THAT INFORMATION. AND THE GOVERNMENT  
17 DIDN'T GET IT. SO THEIR FAILURE TO GET IT LEAVES A HOLE.

18 THEIR DESIRE TO COVER UP THAT HOLE BY BRINGING IN SOME  
19 SIDE TRIAL ABOUT WHY THEY WEREN'T ABLE TO GET IT WHEN THEY  
20 SOUGHT IT TOO LATE, AT A TIME THAT THEY KNEW THAT THE COMPANY  
21 WAS SHUTTING DOWN, THAT'S IRRELEVANT TO THIS CASE. IT MAY BE  
22 RELEVANT TO OTHER PROCEEDINGS, YOUR HONOR. IT'S NOT RELEVANT  
23 TO THIS CASE. THEY HAVE NO CONNECTION TO THIS CASE. SO THAT  
24 SHOULD BE EXCLUDED, AND WE SHOULD HAVE NO RESTRICTIONS ON OUR  
25 ABILITY TO OFFER THAT EVIDENCE.

1 NOR SHOULD WE -- WE SHOULD HAVE NO LIMITATIONS WITH  
2 RESPECT TO OUR ABILITY TO ARGUE ABOUT THEIR FAILURES TO OBTAIN  
3 THAT EVIDENCE. IT IS -- THE GOVERNMENT BEARS THE BURDEN OF  
4 PROOF IN THIS CASE. THEY ARE THE ONES WHO CHOSE TO CHARGE A  
5 CONSPIRACY OF THIS BREADTH AND TO PROCEED IN THIS MANNER. THEY  
6 HAVE THE BURDEN.

7 WE HAVE THE ABILITY TO SAY THAT THERE'S AN OBVIOUS WAY FOR  
8 THEM TO HAVE MET THAT BURDEN, AND THEY DIDN'T DO IT.

9 AND WITH THAT I'LL PAUSE AND TAKE ANY QUESTIONS THAT THE  
10 COURT MAY HAVE.

11 THE COURT: ALL RIGHT. WELL, THANK YOU.

12 WELL, FIRST OF ALL, I PROMISED WE WOULD TAKE A BREAK EVERY  
13 HOUR. I DON'T KNOW IF YOUR TEAM IS READY FOR A BREAK NOW OR  
14 NOT, BUT NOW WOULD BE THE TIME TO TAKE A BREAK.

15 I DO HAVE -- AND I THINK YOU HIT ON A THRESHOLD ISSUE  
16 PERHAPS ABOUT THIS MOTION, AND IT REALLY IS THE LIS DATABASE.  
17 AND MY NOTES TO MYSELF SAY "WHAT ARE WE GOING TO DO ABOUT THIS  
18 AND WHEN?"

19 I'M LOOKING AT THE GOVERNMENT. WHEN DO WE DEAL WITH THIS  
20 ISSUE? BECAUSE I EXPECT WHEN THE GOVERNMENT STANDS AT THEIR  
21 LECTERN TO TALK TO ME ABOUT THIS, THEY HAVE -- I KNOW IT WON'T  
22 SURPRISE YOU -- PROBABLY A 180 DIFFERENT VIEW OF THE LIS. AND  
23 THERE'S A FACTUAL DISPUTE, ISN'T THERE, ABOUT HOW THAT  
24 OCCURRED, AND WHETHER OR NOT SOMEBODY KNEW OR WHERE IS THE KEY?  
25 AND NOBODY COULD FIND THE KEY.

1 AND THERE WERE LAW FIRMS MENTIONED WHO KNEW ABOUT THE KEY  
2 AND WHO WERE IN COMMUNICATION, AND YET THE KEY IS NOT  
3 DISCOVERED. AND ULTIMATELY, AS I UNDERSTAND THE FACTS AT LEAST  
4 FROM THE BRIEFING, THE DATABASE WAS DECONSTRUCTED, DESTROYED  
5 SUCH THAT IT COULD NOT BE RECONSTRUCTED FOR OUR USE IN THIS  
6 TRIAL, AS YOU POINT OUT, VERY IMPORTANT FOR THIS PARTICULAR  
7 TRIAL.

8 THE GOVERNMENT ASKED, AS I'VE LEARNED IN THE BRIEFING, THE  
9 GOVERNMENT ASKED FOR A COPY, A PROXY COPY, I BELIEVE IT'S  
10 CALLED, OF THAT DATABASE, AND THEY WERE PROVIDED SOMETHING, BUT  
11 WHAT THEY WEREN'T PROVIDED WAS A KEY.

12 AND WE CAN TALK ABOUT WHERE THE KEY IS, WHAT HAPPENED AND  
13 ALL OF THAT. BUT LET'S TAKE OUR BREAK NOW. AND THOSE ARE  
14 THINGS THAT I'LL HEAR FROM YOU ABOUT PERHAPS.

15 BUT REALLY THE QUESTION IS WHAT DO WE DO ABOUT THE LIS AND  
16 IS THAT THE BASIS OF ADDITIONAL LITIGATION BRIEFING OF HOW  
17 WE'RE GOING TO DEAL WITH THAT IF IT'S GOING TO COME INTO THIS  
18 CASE, AND IS THAT SOMETHING THAT IS BEYOND THE SCOPE OF THIS  
19 PARTICULAR MOTION IN LIMINE? I THINK IT MIGHT BE.

20 THERE'S REFERENCE TO THE LIS IN THIS, BUT THERE'S NO  
21 SUGGESTION AS TO -- THERE'S CRITICISM ABOUT IT. THERE'S  
22 SUGGESTION THAT IT'S AT ISSUE, BUT THERE'S NOTHING IN THE  
23 BRIEFING THAT SUGGESTS WHAT THE PARTIES WANT TO DO ABOUT IT,  
24 AND THAT WAS A QUESTION THAT I WAS GOING TO HAVE FOR BOTH  
25 SIDES.

10:51AM 1 SO LET'S GIVE YOU AN OPPORTUNITY TO THINK ABOUT THAT  
10:51AM 2 QUESTION. AND WE'LL TAKE A TEN MINUTE BREAK, WE WILL COME  
10:51AM 3 BACK, AND THEN WE'LL CONCLUDE FOR THE MORNING AND TAKE OUR  
10:51AM 4 LUNCH BREAK. AND COME BACK AFTER THIS.

10:51AM 5 WE'LL TAKE TEN MINUTES.

10:51AM 6 MR. WADE: THANK YOU, YOUR HONOR.

10:51AM 7 (RECESS FROM 10:51 A.M. UNTIL 11:09 A.M.)

11:09AM 8 THE COURT: ALL RIGHT. THANK YOU. WE'RE BACK ON  
11:09AM 9 THE RECORD. ALL PARTIES PREVIOUSLY PRESENT ARE PRESENT ONCE  
11:09AM 10 AGAIN. AND WE HAD OUR BREAK.

11:09AM 11 MR. DOWNEY, I THINK I LEFT YOU AT THE BREAK WITH A  
11:09AM 12 QUESTION OR A POTENTIAL QUESTION THAT THE COURT HAD ABOUT THE  
11:09AM 13 LIS AND WHAT SHOULD BE DONE ABOUT IT, THE ISSUE I SHOULD SAY.

11:09AM 14 MR. WADE: YES, YOUR HONOR. LET ME ADDRESS THAT  
11:09AM 15 BRIEFLY.

11:09AM 16 FIRST OF ALL, I BELIEVE THE ISSUE IS BEFORE THE COURT AT  
11:09AM 17 DOCKET 565 AT 4 IN CONNECTION WITH A MOTION TO EXCLUDE CERTAIN  
11:10AM 18 404(B) EVIDENCE THAT INVOLVES THERANOS EMPLOYEES UNRELATED TO  
11:10AM 19 MS. HOLMES. WE MOVED TO EXCLUDE ANY OFFER OF EVIDENCE BY THE  
11:10AM 20 GOVERNMENT OF LIS, OF THE ALLEGED LIS DESTRUCTION. SO I  
11:10AM 21 BELIEVE IT IS BEFORE THE COURT. THAT MOTION WILL BE ADDRESSED  
11:10AM 22 IN MORE DETAIL I BELIEVE TOMORROW, BUT I BELIEVE THE MATTER IS  
11:10AM 23 RIPE BEFORE THE COURT.

11:10AM 24 WITH RESPECT TO THE EVIDENCE ITSELF AND HOW IT WORKS INTO  
11:10AM 25 THIS CASE OR WHETHER IT WORKS INTO THIS CASE, LET ME REITERATE

11:10AM 1 A COUPLE OF POINTS. ONE, THE GOVERNMENT KNEW ABOUT THIS  
11:10AM 2 EVIDENCE FOR YEARS BEFORE IT RETURNED AN INVESTIGATION. WE  
11:10AM 3 CITE THE EXHIBITS IN OUR MOTION PAPERS, BUT THERE'S A LETTER  
11:10AM 4 ADVISING THEM OF THIS IN DECEMBER OF 2016. IT'S CLEAR THAT  
11:10AM 5 THEY KNEW ABOUT IT THROUGHOUT 2018, AND WERE IN DISCUSSIONS  
11:10AM 6 WITH COMPANY COUNSEL ABOUT THIS DATABASE.

11:10AM 7 THEY ALSO KNEW THAT THE COMPANY WAS GOING TO CLOSE.  
11:11AM 8 THERE'S EVIDENCE WITHIN -- FROM WITHIN THE GOVERNMENT FILES  
11:11AM 9 THAT THEY KNEW THE FINANCIAL TRAJECTORY OF THERANOS AT THAT  
11:11AM 10 TIME AND THAT IT WAS LIKELY TO CLOSE.

11:11AM 11 IN FACT, GOVERNMENT PERSONNEL, FBI AGENTS, TOOK A TRUCK  
11:11AM 12 AND DROVE TO THE THERANOS FACILITY AND BACKED IT UP AND GOT A  
11:11AM 13 WHOLE SLEW OF EVIDENCE FROM THE THERANOS FACILITY JUST AS IT  
11:11AM 14 WAS ABOUT TO CLOSE.

11:11AM 15 IT COULD HAVE EASILY GOTTEN THE LIS DATABASE  
11:11AM 16 INFRASTRUCTURE AND PUT IT ON THAT TRUCK. IT CHOSE NOT TO.

11:11AM 17 IT IS A FUNDAMENTAL PRINCIPLE OF LAW THAT THE GOVERNMENT  
11:11AM 18 NEEDS TO OBTAIN THE EVIDENCE IT NEEDS TO PROVE ITS CASE BEFORE  
11:11AM 19 IT RETURNS AN INDICTMENT.

11:11AM 20 NOW, THERE HAS BEEN A LOT OF GRAND JURY ACTIVITY IN THIS  
11:11AM 21 CASE, YOUR HONOR, AND I WILL SET ASIDE WITH SOME RESTRAINT THE  
11:11AM 22 PROPRIETARY OF SOME OF THAT GRAND JURY ACTIVITY AND WHETHER  
11:12AM 23 IT'S BEING USED AS A DISCOVERY MECHANISM.

11:12AM 24 HERE THE GOVERNMENT SAYS IT IS NOT, AND WE WILL ACCEPT  
11:12AM 25 THEM AT THEIR WORD. THEY HAVE A SEPARATE MATTER THAT RELATES

11:12AM 1 TO THIS AS IT RELATES TO THE GRAND JURY, AND I WON'T GO INTO  
11:12AM 2 THAT MORE DEEPLY IN THIS FORUM.

11:12AM 3 BUT AT THE TIME THAT THEY CHOSE TO BRING ITS CASE, IT HAD  
11:12AM 4 TO HAVE EVIDENCE TO PROVE ITS CASE. IT DIDN'T HAVE THAT  
11:12AM 5 EVIDENCE. IT HAD NOT OBTAINED THAT DATABASE. IT NOW HAS TO  
11:12AM 6 SUFFER THE CONSEQUENCES OF THAT.

11:12AM 7 WHATEVER HAPPENED THEREAFTER WITH RESPECT TO THAT DATABASE  
11:12AM 8 COULD BE THE SUBJECT OF A TRIAL UNTO ITSELF, CERTAINLY A MINI  
11:12AM 9 TRIAL WITHIN THIS TRIAL THAT WOULD INVOLVE WITNESSES. THERE  
11:12AM 10 HAVE ABOUT 20 WITNESSES THAT HAVE BEEN INTERVIEWED OR HAVE  
11:12AM 11 GIVEN TESTIMONY IN CONNECTION WITH THAT MATTER. THAT DOES NOT  
11:12AM 12 INCLUDE GOVERNMENT PERSONNEL WHO WOULD BE RELEVANT TO THAT  
11:13AM 13 CASE, INCLUDING EVERY MEMBER OF THE PROSECUTION TEAM WHO WOULD  
11:13AM 14 BE A WITNESS AS TO WHETHER THEY TOOK APPROPRIATE STEPS TO  
11:13AM 15 OBTAIN THAT EVIDENCE WHEN THEY KNEW ABOUT IT FOR YEARS AND WHEN  
11:13AM 16 IT WAS PRODUCED TO THEM.

11:13AM 17 BECAUSE IF YOU LOOK AT THE BRADY LETTER THAT IS SET FORTH  
11:13AM 18 AND AS AN EXHIBIT TO OUR MOTION, YOU'LL SEE IT'S THE LONGEST  
11:13AM 19 BRADY LETTER I'VE EVER RECEIVED. IT'S MORE THAN 20 PAGES, I  
11:13AM 20 BELIEVE, AND IT SETS FORTH THE CHRONOLOGY IN EXCRUCIATING  
11:13AM 21 DETAIL AS TO WHEN THE GOVERNMENT LEARNED ABOUT THE FACT THAT  
11:13AM 22 THE COMPANY WAS CLOSING, WHEN IT KNEW ABOUT THE LIS, WHEN IT  
11:13AM 23 KNEW ABOUT ALL OF THIS INFORMATION, AND WHEN IT GOT THAT COPY  
11:13AM 24 AND HOW IT DEALT WITH THAT COPY WELL KNOWING THAT THE COMPANY  
11:13AM 25 WAS ABOUT TO CLOSE.

11:13AM 1 NOT EXPEDITIOUSLY, NOT THOROUGHLY, AND NOT DILIGENTLY.

11:13AM 2 SORT OF SLOWLY.

11:13AM 3 AND THEN IT WENT TO ITS OWN INTERNAL EXPERTS WITHIN THE

11:13AM 4 U.S. ATTORNEY'S OFFICE AND SOUGHT GUIDANCE AS TO HOW THEY MIGHT

11:14AM 5 ACCESS THAT. THEY GOT VERY GOOD ADVICE IT TURNS OUT BECAUSE IT

11:14AM 6 WASN'T JUST THE COPY THAT WAS RELEVANT THAT THEY HAD WHERE THEY

11:14AM 7 HAD AN ISSUE WITH THE KEY. THAT'S A LITTLE BIT OF A RED

11:14AM 8 HERRING THERE. THERE WAS ALSO A COPY ON A SERVER SYSTEM THAT

11:14AM 9 THERANOS HAD.

11:14AM 10 AND THEIR OWN EXPERT, THEIR OWN INTERNAL LITIGATION

11:14AM 11 SUPPORT EXPERT WHO WOULD BE A WITNESS IN THIS MINI TRIAL SAYS

11:14AM 12 YOU CAN GO AND GET ALL OF THAT HARDWARE AND RECREATE IT WITHIN

11:14AM 13 THE U.S. ATTORNEY'S OFFICE, BUT THEY NEVER DID THAT. THEY

11:14AM 14 DIDN'T DO MUCH OF ANYTHING FOR A YEAR AND A HALF.

11:14AM 15 NOW, IN THE INTERVENING PERIOD THE ASSIGNEE, WHO TOOK OVER

11:14AM 16 FOR THERANOS THEREAFTER, GAVE UP THE SERVERS. THE HARDWARE

11:14AM 17 INFRASTRUCTURE ON WHICH THAT SYSTEM OPERATED, THOSE WERE

11:15AM 18 RETURNED TO LEASEES -- LEASORS.

11:15AM 19 SO AT THAT POINT THE ABILITY TO RECONSTRUCT THE

11:15AM 20 LIS DATABASE WAS GONE, BUT AT THE TIME THAT THEY TOOK IT DOWN

11:15AM 21 TO PUT IT IN STORAGE, THE TESTIMONY OF THE EXPERTS IN THIS

11:15AM 22 MATTER SUGGEST THAT THEY THOUGHT THAT THEY COULD GET IT BACK UP

11:15AM 23 WITHIN A MONTH. THAT'S WHAT -- I'M NOT GOING TO IDENTIFY

11:15AM 24 NAMES. I COULD DO THAT IN A SEPARATE PROCEEDING IF IT'S

11:15AM 25 HELPFUL TO THE COURT. I THINK THE COURT KNOWS SOME OF THE



1 NAMES, BUT SOME OF THE RELEVANT I.T. PROFESSIONALS WHO ARE  
2 INVOLVED IN THAT JUDGMENT, THE MOST KNOWLEDGEABLE I.T.  
3 PROFESSIONALS HAVE OFFERED STATEMENTS TO SAY THAT THEY THOUGHT  
4 THEY COULD OFFER THAT -- THEY COULD PUT THIS DATABASE BACK  
5 TOGETHER WITHIN A MONTH. SO THE COPY IS ONE THING. THE  
6 EXISTING INFRASTRUCTURE IS ANOTHER.

7 SO THE GOVERNMENT'S FAILURE TO MOVE ON THAT IS A  
8 SIGNIFICANT ISSUE WITH RESPECT TO THIS MATTER.

9 NOW, YOUR HONOR, I HAVE A SOLUTION TO THIS MESS, WHICH IS  
10 DOCKET 565 AT 4. THIS HAS NOTHING TO DO WITH ELIZABETH HOLMES.  
11 NOTHING. THE GOVERNMENT DOESN'T -- THE GOVERNMENT TRIED IN ITS  
12 OPPOSITION TO OUR ANECDOTAL EVIDENCE MOTION TO CREATE A  
13 NEFARIOUS IMPLICATION THAT COUNSEL FOR MS. HOLMES WAS INVOLVED.

14 WE DISABUSED THEM OF THAT. THEY DID IT BASED ON A  
15 PRIVILEGE LOG. I'M SURE THEY DID IT IN GOOD FAITH. THEY HAVE  
16 OVERREAD THE PRIVILEGE LOG. THOSE DOCUMENTS HAVE NOTHING TO DO  
17 WITH LIS. AND AS WE SAID IN OUR BRIEFING, WE WOULD BE PREPARED  
18 TO OFFER THEM TO THE COURT IN CAMERA TO DEMONSTRATE THAT.

19 BUT THERE'S NO, NO OFFER OF PROOF THAT THE GOVERNMENT CAN  
20 MAKE THAT MS. HOLMES, OR HER COUNSEL OR ANYONE ELSE, HAD ANY  
21 ROLE WHATSOEVER IN THE DISMANTLING OF THAT OR THE PRODUCTION OF  
22 THE COPY, EITHER ONE OF THE TWO OPTIONS.

23 GIVEN THAT, THAT HAS NO ROLE IN THIS CASE WHICH RELATES TO  
24 MS. HOLMES. IT'S IRRELEVANT UNDER 401, AND IT WOULD BE  
25 INCREDIBLY PREJUDICIAL UNDER 403 SINCE SHE HAD NOTHING TO DO

11:17AM 1 WITH IT. BUT JUST BECAUSE THE GOVERNMENT CAN'T GET INTO THAT  
11:17AM 2 DOESN'T MEAN THAT WE DON'T GET TO STAND IN FRONT OF THE JURORS  
11:17AM 3 AND SAY THAT THEIR FAILURE TO GET THE EVIDENCE BEFORE BRINGING  
11:17AM 4 THE INDICTMENT IS A CRITICAL DEFICIENCY IN THEIR CASE. WE  
11:17AM 5 FULLY INTEND TO DO THAT.

11:17AM 6 THE FACT THAT THEY TRIED TO GET IT LATER AND MAKE WHOEVER  
11:17AM 7 SHOT WHO WITH RESPECT TO THAT IS FOR ANOTHER PROCEEDING.  
11:17AM 8 THAT'S NOT RELEVANT TO THIS CASE.

11:17AM 9 WHAT IS RELEVANT IS THAT AT THE TIME THAT THEY SERVED THE  
11:18AM 10 INDICTMENT, THEY HAD EVIDENCE THAT THEY, I ASSUME, REPRESENTED  
11:18AM 11 TO THE GRAND JURY BY WHICH THEY COULD PROVE IT, AND THEY DON'T.

11:18AM 12 NOW, THAT IS WHY THOSE DEFICIENCIES ARE WHY THE GOVERNMENT  
11:18AM 13 CONTINUES TO COME BACK TO THESE ANECDOTES. IT'S THE ONLY THING  
11:18AM 14 THAT THEY'VE GOT. AND WHY THEY CONTINUE TO CALL THESE PATIENTS  
11:18AM 15 VICTIMS, WHICH IS A PRESUMPTION. THEY DON'T HAVE EVIDENCE THAT  
11:18AM 16 THEY'RE VICTIMS.

11:18AM 17 THEY HAVE EVIDENCE THAT THEY DID NOT GET ACCURATE TEST  
11:18AM 18 RESULTS. WE DON'T KNOW WHY THEY DIDN'T GET ACCURATE TEST  
11:18AM 19 RESULTS, BUT IF WE ASSUME FOR ARGUMENT SAKE -- IT'S NOT CLEAR  
11:18AM 20 SOME OF THEM -- ALL OF THEM GOT INACCURATE TEST RESULTS, WE'RE  
11:18AM 21 NOT CONCEDING THAT, BUT EVEN IF YOU DO, WE DON'T KNOW WHY  
11:18AM 22 BECAUSE THE GOVERNMENT HASN'T DONE THE ANALYSIS NECESSARY TO DO  
11:18AM 23 THAT.

11:18AM 24 AND IT'S VERY TELLING, YOUR HONOR, YOU SAW THE CIRCULAR  
11:19AM 25 CHART FROM MS. SAHARIA. I THINK IF ONE OF THESE PATIENTS FALLS

11:19AM 1 WITHIN -- THEIR OWN EXPERT WILL NOT SUPPORT THIS VIEW, NOT  
11:19AM 2 ONLY -- NOT JUST WITH RESPECT TO PROCESS, THE IDEA THAT ONE  
11:19AM 3 CUSTOMER IS EVIDENCE OF INABILITY TO PROVIDE ACCURATE AND  
11:19AM 4 RELIABLE RESULTS, BUT THEIR OWN EXPERT WON'T OPINE ON MANY OF  
11:19AM 5 THE ASSAYS THAT THESE VERY PATIENTS RECEIVED.

11:19AM 6 IF I MIGHT BEFORE I STOP AND TAKE QUESTIONS FROM THE  
11:19AM 7 COURT, I THINK IF WE'RE HONEST ABOUT THE ELEPHANT IN THE ROOM,  
11:19AM 8 IF THE COURT LOOKS AT THE LANGUAGE THAT IS USED BY THE LANGUAGE  
11:19AM 9 TO DESCRIBE SUPPOSED VICTIMS, THESE HARROWING EXPERIENCES, AND  
11:19AM 10 THESE, LIKE, POTENTIAL HUGE CONSEQUENCES. YOU KNOW, THEY  
11:19AM 11 CLEARLY -- THE EMOTIONAL APPEAL OF THIS EVIDENCE IS WHY THEY  
11:19AM 12 WANT TO OFFER IT. THAT WOULD BE THE SUBJECT OF A MOTION. IT'S  
11:19AM 13 EXACTLY WHY IT'S NOT -- IT'S PARTICULARLY WHY IT'S NOT  
11:20AM 14 PERMISSIBLE BECAUSE IT'S HIGHLY PREJUDICIAL.

11:20AM 15 BUT EVEN BEFORE WE GET TO THAT 403 BALANCING, EVEN BEFORE  
11:20AM 16 WE GET TO THE -- WHAT IS ALWAYS THERE, IT GOES TO WEIGHT, IT  
11:20AM 17 HAS TO BE RELEVANT. IT HAS TO BE RELEVANT AND THE FOUNDATION  
11:20AM 18 OF ITS RELEVANCE HAS TO BE OFFERED BEFORE A WEIGHT ANALYSIS IS  
11:20AM 19 ENGAGED IN WHATSOEVER.

11:20AM 20 THE COURT: WELL, IS IT RELEVANT FOR A PATIENT TO  
11:20AM 21 SAY I PAID MONEY TO THERANOS FOR ONE OF THEIR TESTS. I WAS  
11:20AM 22 INTRIGUED BY THE ADVERTISING, AND WHATEVER, AND THE  
11:20AM 23 REPRESENTATIONS MADE. ALTHOUGH RELIANCE IS NOT NECESSARY, WE  
11:20AM 24 KNOW THAT.

11:20AM 25 BUT A PATIENT SAYS, I PAID MONEY FOR THIS, I DIDN'T GET

11:20AM 1 WHAT I PAID FOR I DISCOVERED. THE TEST WAS ERRONEOUS.

11:20AM 2 ISN'T THAT RELEVANT? DOES THAT HAVE SOME RELEVANCE?

11:20AM 3 MR. WADE: NO, BECAUSE WE DON'T KNOW WHY IT WAS  
11:20AM 4 ERRONEOUS, YOUR HONOR. THAT'S THE WHOLE POINT. THERE HAS TO  
11:21AM 5 BE A CAUSAL CONNECTION.

11:21AM 6 IT WOULD BE LIKE SAYING, YOUR HONOR, I WANT TO PROVE -- I  
11:21AM 7 WANT TO CONVICT DR. FAUCCI OF FRAUD BY SAYING THAT THESE  
11:21AM 8 VACCINES ARE GREAT AND INCREDIBLY RELIABLE AND SAFE.

11:21AM 9 MY EVIDENCE OF THAT IS NOT THE REGULATORY APPROVALS, IT'S  
11:21AM 10 NOT ALL OF THE TESTING DATA THAT THEY DID, IT'S NOT THE  
11:21AM 11 UNIVERSE OF MATERIAL AS A WHOLE. IT'S ONE PERSON WHO HAS A  
11:21AM 12 BLOOD CLOT AND TWO PEOPLE WHO DIE WITHIN A WEEK.

11:21AM 13 THE COURT: BUT THE DIFFERENCE IS THAT DR. FAUCCI IS  
11:21AM 14 NOT MAKING MONEY ON THE REPRESENTATION, IS HE? HE'S MAKING AN  
11:21AM 15 OBSERVATION -- PERHAPS IF HE SAID SUCH A THING HE IS MAKING AN  
11:21AM 16 OBSERVATION.

11:21AM 17 IT'S A LITTLE DIFFERENT HERE WHERE A COMPANY REPRESENTS  
11:21AM 18 ITSELF AND ITS ABILITY TO DO CERTAIN THINGS, AND SOMEBODY HIRES  
11:21AM 19 THE COMPANY, TAKES THE TEST, AND THEN THEY DIDN'T GET WHAT THEY  
11:21AM 20 THOUGHT THEY WERE GOING TO GET. END OF STORY. PERIOD. HARD  
11:21AM 21 STOP THERE.

11:21AM 22 ISN'T THAT RELEVANT THAT I PAID FOR SOMETHING AND I DIDN'T  
11:22AM 23 GET IT?

11:22AM 24 MR. WADE: WELL, THE GOVERNMENT -- NO, IN SHORT,  
11:22AM 25 BECAUSE WE DON'T KNOW WHY THEY DIDN'T GET IT.

11:22AM 1 AGAIN, THE GOVERNMENT CAN'T EVEN -- WITH THESE STATISTICS  
11:22AM 2 CANNOT EVEN SHOW ASSOCIATION MUCH LESS CAUSATION. WE DON'T  
11:22AM 3 KNOW WHAT CAUSED THE -- THE DYNAMIC PROCESS OF BLOOD TESTING,  
11:22AM 4 YOUR HONOR --

11:22AM 5 THE COURT: SO IS THAT THE RESPONSIBILITY OF THE  
11:22AM 6 CUSTOMER, THE CLIENT, TO SAY I DIDN'T GET WHAT I WANTED BECAUSE  
11:22AM 7 YOU SAID THAT YOU WOULD GIVE ME AN ACCURATE TEST AND IF YOU  
11:22AM 8 CALLED -- IF YOU GO TO A COMPANY AND SAY A CUSTOMER GOES TO THE  
11:22AM 9 COMPANY AND SAYS, YOU DIDN'T GIVE ME WHAT I WANT, AND WHAT YOU  
11:22AM 10 REPRESENTED. IS THE COMPANY THEN SUPPOSED TO SAY, WELL, YEAH.  
11:22AM 11 PROVE IT? TELL ME WHY? I'M NOT GOING TO GIVE YOU ANY RELIEF  
11:22AM 12 UNTIL YOU PROVE TO ME WHY YOU THINK. AND PUT THE BURDEN ON THE  
11:22AM 13 CLIENT TO DISPROVE THAT? IS THAT HOW IT WORKS?

11:22AM 14 MR. WADE: WELL, YOUR HONOR --

11:22AM 15 THE COURT: IS THAT TOO SIMPLE?

11:22AM 16 MR. WADE: YOU'RE ESSENTIALLY TALKING ABOUT A  
11:23AM 17 CUSTOMER SERVICE COMPLAINT AND A RESPONSE TO THAT WHICH IS  
11:23AM 18 SOMEWHAT INTERESTING BECAUSE THE THEORY THAT THE GOVERNMENT  
11:23AM 19 SETS FORTH WOULD BASICALLY -- THE IMPLICATION OF THE  
11:23AM 20 GOVERNMENT'S ARGUMENT, THE BREADTH OF ITS CONTENTION IS WHEN  
11:23AM 21 ALMOST ANYBODY WHO OFFERS A PRODUCT OR SERVICE COMES FORWARD  
11:23AM 22 AND SAYS THIS IS A GOOD PRODUCT, NOT JUST DIRECTLY BUT DIRECTLY  
11:23AM 23 AND IMPLICITLY ACCORDING TO THE GOVERNMENT, AND THEN THERE'S  
11:23AM 24 ANY COMPLAINT ABOUT IT, THAT'S EVIDENCE OF FRAUD WITHOUT  
11:23AM 25 SHOWING WHETHER, YOU KNOW, THERE'S A CAUSAL LINK BETWEEN THE

11:23AM 1 SERVICE THAT IS PROVIDED AND THE HARM OR COMPLAINT THAT  
11:23AM 2 RESULTS. THAT'S THE CRITICAL PIECE.

11:23AM 3 AND, YOUR HONOR, PUTTING A DRUG COMPANY CEO IN THE PLACE  
11:23AM 4 OF DR. FAUCCI, THE ADMISSIBLE -- THE EVIDENCE WOULD BE NO MORE  
11:23AM 5 ADMISSIBLE. THOSE ADMIRATIONAL ANECDOTES, WHICH ARE COMPLETELY  
11:23AM 6 EXPECTED IN THE SAME WAY THAT ERRORS ARE EXPECTED WITHIN A LAB,  
11:23AM 7 ARE NO MORE ADMISSIBLE TO PROVE THAT IN AND OF THEMSELVES THAN  
11:24AM 8 THAT ANYTHING ELSE.

11:24AM 9 THE COURT: LET ME ASK IT THIS WAY. IT SEEMS LIKE  
11:24AM 10 WHAT YOU'RE SAYING IS THAT -- I LOOKED AT MS. SAHARIA'S CHART  
11:24AM 11 AND THE CASCADING CIRCLES THERE, AND IT SEEMS LIKE IT'S REALLY  
11:24AM 12 A WEIGHT ISSUE. ISN'T IT MORE OF A WEIGHT ISSUE? AND ISN'T  
11:24AM 13 THAT YOUR CLOSING ARGUMENT THAT IT IS A 1 IN A MILLION AND THIS  
11:24AM 14 IS THE BEST THAT YOU CAN DO, LADIES AND GENTLEMEN, AND YOU  
11:24AM 15 CAN'T CONVICT ON THAT? ISN'T IT REALLY A WEIGHT ISSUE?

11:24AM 16 MR. WADE: IT'S NOT A WEIGHT ISSUE, YOUR HONOR,  
11:24AM 17 BECAUSE WEIGHT ONLY COMES TO BEAR IN A CASE ONCE THE EVIDENCE  
11:24AM 18 HAS A TICKET TO ADMISSION.

11:24AM 19 SO THEY STILL, BEFORE THEY DO -- OTHERWISE IT EFFECTIVELY  
11:24AM 20 SHIFTS THE BURDEN TO MS. HOLMES. THEY HAVE THE BURDEN OF  
11:24AM 21 PROVING THEIR CASE. THEY HAVE CHOSEN TO MAKE THESE BROAD  
11:24AM 22 ALLEGATIONS WITH RESPECT TO ACCURACY AND RELIABILITY.

11:24AM 23 THE EVIDENCE THAT THEY'RE WANTING TO OFFER ON THESE  
11:25AM 24 PATIENTS IS NOT RELEVANT TO THAT BECAUSE THEY HAVE NOT  
11:25AM 25 ESTABLISHED THAT CAUSAL LINK EITHER SPECIFICALLY IN THE

11:25AM 1 LIS DATABASE OR STATISTICALLY IN CONNECTION WITH SOME VALID  
11:25AM 2 SCIENTIFIC STUDY.

11:25AM 3 THERE ARE MECHANISMS BY WHICH THEY COULD DO IT. YOU WOULD  
11:25AM 4 EXPECT IF THEY WERE TO CHOOSE TO DO THAT THEY WOULD ENGAGE IN  
11:25AM 5 ONE OF THOSE MECHANISMS. BUT WHEN THEY DON'T DO THAT, THEY  
11:25AM 6 CAN'T SCOUR THE EARTH, WHICH THEY HAVE DONE HERE FOR YEARS IN A  
11:25AM 7 HIGH PROFILE CASE, YOUR HONOR, WHERE PEOPLE ARE COMING OUT OF  
11:25AM 8 THE WOODWORK, AND THEY WANT TO TAKE 1 IN A MILLION PATIENTS AND  
11:25AM 9 PUT THEM IN FRONT OF THE JURY AND SHIFT THE BURDEN TO  
11:25AM 10 MS. HOLMES TO SAY THESE PEOPLE PROVED THAT THEY WERE NOT  
11:25AM 11 CAPABLE OF PRODUCING ACCURATE AND RELIABLE RESULTS AND NOW WE,  
11:25AM 12 WITHOUT THE LIS DATABASE, HAVE THE BURDEN OF SAYING THERE'S NO  
11:25AM 13 CAUSATION.

11:25AM 14 THEY HAVE TO ESTABLISH THE CAUSATION BEFORE IT BECOMES  
11:25AM 15 RELEVANT IN THIS CASE. WE DON'T -- FOR ALL WE KNOW, THERE  
11:25AM 16 COULD BE DIET, THERE COULD BE MEDICATION, THERE COULD BE HEALTH  
11:26AM 17 CONDITIONS. THERE COULD BE OTHER THINGS THAT CAUSE THOSE  
11:26AM 18 ERRONEOUS RESULTS. WE DON'T KNOW THAT.

11:26AM 19 THE COURT: OKAY. GIVE ME JUST A MOMENT.

11:26AM 20 I'VE BEEN PASSED A NOTE THAT TELLS ME THAT OUR CONFERENCE  
11:26AM 21 LINE WAS DISCONNECTED AND THE PUBLIC CAN NO LONGER HEAR.

11:26AM 22 HAS THAT BEEN CORRECTED?

11:26AM 23 THE CLERK: YOUR HONOR, I DID NOT WANT TO INTERRUPT  
11:26AM 24 THE PROCEEDINGS BUT THERE'S NO WAY FOR ME, THERE'S NO WAY FOR  
11:26AM 25 ME TO RECONNECT WITHOUT GOING THROUGH THE P.A. AND INTERRUPTING

11:26AM 1 THESE PROCEEDINGS --

11:26AM 2 THE COURT: WELL, THIS IS --

11:26AM 3 THE CLERK: -- TO GET THEM BACK ON.

11:26AM 4 THE COURT: SO WHAT DO WE NEED TO DO, PAUSE THESE

11:26AM 5 PROCEEDINGS?

11:26AM 6 THE CLERK: CAN WE TAKE A FIVE MINUTE BREAK. I

11:26AM 7 APOLOGIZE, YOUR HONOR.

11:26AM 8 THE COURT: LET'S DO THAT. I THINK THE PUBLIC HAS A

11:26AM 9 RIGHT TO HEAR. WE'RE NOT ALLOWING THEM INTO THE COURTROOM

11:26AM 10 BECAUSE OF OUR HEALTH CONDITIONS, BUT WE ARE OFFERING THEM THE

11:26AM 11 ABILITY TO PARTICIPATE VIA THE TELEPHONE LINE.

11:26AM 12 I THINK BEFORE WE GO FURTHER, COUNSEL, I THINK I WOULD

11:26AM 13 LIKE TO REESTABLISH THE CONNECTION, PLEASE. SO LET'S TAKE A

11:27AM 14 PAUSE TO DO THAT.

11:27AM 15 MR. WADE: WE UNDERSTAND, YOUR HONOR.

11:27AM 16 THE CLERK: COURT IS IN RECESS.

11:27AM 17 (PAUSE IN PROCEEDINGS.)

11:27AM 18 THE COURT: CAN WE STAY HERE WHILE YOU'RE DOING

11:27AM 19 THAT?

11:27AM 20 THE CLERK: IF YOU'D LIKE, YOUR HONOR.

11:27AM 21 MR. WADE: YOUR HONOR, IF I MAY JUST STEP IN HERE.

11:27AM 22 THE COURT: YES. GO RIGHT AHEAD. SURE.

11:27AM 23 (PAUSE IN PROCEEDINGS.)

11:28AM 24 THE CLERK: WE'RE READY TO PROCEED.

11:28AM 25 THE COURT: LET ME INDICATE THAT WE'VE RECEIVED



11:28AM 1 NOTICE THAT OUR TELEPHONE LINE WAS DISCONNECTED FOR A BRIEF  
11:28AM 2 PERIOD OF TIME WHILE COUNSEL WAS SPEAKING.

11:28AM 3 MR. WADE, DO YOU JUST WANT TO SUMMARIZE YOUR LAST COMMENT,  
11:28AM 4 AND THEN I'LL TURN TO THE GOVERNMENT TO SEE IF THEY HAVE  
11:28AM 5 ANYTHING TO SAY.

11:28AM 6 MR. WADE: I'M NOT SURE I'LL ADEQUATELY -- I'LL DO  
11:28AM 7 IT JUSTICE, YOUR HONOR, A SECOND TIME, BUT I'LL JUST STOP BY  
11:29AM 8 SAYING YOUR HONOR ASKED ABOUT WEIGHT. WE BELIEVE THAT THEY  
11:29AM 9 HAVE TO ESTABLISH RELEVANCE BEFORE THEY DO THIS AND BEFORE IT'S  
11:29AM 10 ADMISSIBLE AND WEIGHT IS CONSIDERED.

11:29AM 11 BUT I WILL ADD, IN THE EVENT THAT THERE IS SOME MINUSCULE  
11:29AM 12 RELEVANCE HERE, THE PREJUDICIAL IMPACT ON SUCH ANECDOTAL  
11:29AM 13 EVIDENCE JUST SWAMPS ANY PROBATIVE VALUE BASED ON THE  
11:29AM 14 STATISTICALLY ANALYSIS AND PARTICULARLY GIVEN THE LACK OF  
11:29AM 15 ACCESS TO THE LIS TO REFUTE THOSE ALLEGATIONS.

11:29AM 16 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. THANK  
11:29AM 17 YOU.

11:29AM 18 MR. BOSTIC, DO YOU SPEAK FOR THE GOVERNMENT ON THIS  
11:29AM 19 MOTION?

11:29AM 20 MR. BOSTIC: YES, YOUR HONOR. GOOD MORNING. IT'S  
11:29AM 21 NICE TO SEE YOU.

11:29AM 22 THE COURT: NICE TO SEE YOU.

11:29AM 23 MR. BOSTIC: BETWEEN MS. SAHARIA AND MR. WADE  
11:29AM 24 THERE'S A LOT TO RESPOND TO, SO I'LL ASK THE COURT'S INDULGENCE  
11:29AM 25 THERE.

11:29AM 1 I WOULD LIKE TO RESPOND TO THE BULK OF MR. WADE'S ARGUMENT  
11:29AM 2 RELATING TO THE LIS, BUT FIRST I WOULD LIKE TO SPEAK ABOUT  
11:29AM 3 PATIENT TESTIMONY AND ITS IMPORTANCE IN THIS CASE AND WHY I  
11:30AM 4 THINK MR. WADE IS ACTUALLY MAKING THE WRONG ARGUMENT OVERALL.

11:30AM 5 MR. WADE HIMSELF SAID THAT THE DEFENSE VIEWS THIS CASE  
11:30AM 6 OSTENSIBLY OR ESSENTIALLY AS A PRODUCTS LIABILITY CASE. THAT'S  
11:30AM 7 NOT CORRECT. THAT'S NOT THE KIND OF CASE THAT THIS IS. THIS  
11:30AM 8 IS A CRIMINAL WIRE FRAUD CASE. IT'S VERY DIFFERENT FROM A  
11:30AM 9 CIVIL PRODUCTS LIABILITY CASE.

11:30AM 10 AND TO THE EXTENT THAT THEY SEEK TO DEFEND IT AS A  
11:30AM 11 PRODUCTS LIABILITY CASE OR SEEK TO EXCLUDE EVIDENCE THAT WOULD  
11:30AM 12 NOT BE PART OF A PRODUCTS LIABILITY CASE, THAT'S A MISTAKE THAT  
11:30AM 13 THEY'RE MAKING. IT'S THE WRONG ARGUMENT, AND THE COURT SHOULD  
11:30AM 14 DENY ANY REQUEST ON THAT BASIS.

11:30AM 15 THIS IS NOT A CIVIL ACTION WHERE THE SAFETY OF A PRODUCT  
11:30AM 16 AND WHETHER IT MEETS INDUSTRY STANDARDS IS THE KEY QUESTION.  
11:30AM 17 THIS IS A WIRE FRAUD CASE WHERE THE KEY QUESTION IS WHAT DID  
11:31AM 18 THE DEFENDANT INTEND? DID THE DEFENDANT MAKE KNOWING  
11:31AM 19 MISREPRESENTATIONS WITH THE INTENT TO DECEIVE AND CHEAT  
11:31AM 20 CUSTOMERS OF THERANOS?

11:31AM 21 THE FACT THAT THE FRAUD IN THIS CASE RELATES TO A PRODUCT  
11:31AM 22 OFFERED BY A COMPANY DOES NOT TURN IT FROM A CRIMINAL WIRE  
11:31AM 23 FRAUD CASE INTO A PRODUCTS LIABILITY CASE. IT NEEDS TO BE  
11:31AM 24 JUDGED BASED ON THE ELEMENTS OF CRIMINAL WIRE FRAUD AND THOSE  
11:31AM 25 ELEMENTS ALONE.

11:31AM 1 SO WHAT IS THIS CASE? THIS IS A CASE WHERE THE INDICTMENT  
11:31AM 2 ALLEGES THAT THE DEFENDANT DEFRAUDED PATIENTS BY CLAIMING THAT  
11:31AM 3 THERANOS TESTS WERE ACCURATE AND RELIABLE WHEN, IN FACT, THEY  
11:31AM 4 WERE NOT. AND SHE KNEW IT.

11:31AM 5 PATIENTS PAID FOR THOSE TESTS BELIEVING THAT THEY WOULD  
11:31AM 6 RECEIVE ACCURATE AND RELIABLE RESULTS, NOT KNOWING THAT THOSE  
11:31AM 7 TESTS SUFFERED FROM ACCURACY AND RELIABILITY PROBLEMS.

11:31AM 8 WHEN THAT HAPPENED, WHEN THEY PAID FOR THOSE TESTS  
11:31AM 9 THINKING THAT THEY WERE ACCURATE BUT GOT THE OPPOSITE, THEY  
11:31AM 10 BECAME VICTIMS OF DEFENDANT'S FRAUD. AND WE UNDERSTAND THAT  
11:32AM 11 THE DEFENSE DOES NOT ACCEPT THE GOVERNMENT'S THEORY OF THE  
11:32AM 12 CASE. THE DEFENSE PREVIOUSLY MOVED TO DISMISS THE INDICTMENT  
11:32AM 13 BECAUSE THEY DISAGREED WITH THAT THEORY. THE COURT IN LARGE  
11:32AM 14 PART DENIED THOSE MOTIONS TO DISMISS. THIS CASE IS HEADING  
11:32AM 15 TOWARDS TRIAL ON THAT THEORY AS CHARGED IN THE INDICTMENT.

11:32AM 16 AT TRIAL ACTUAL AND INTENDED VICTIMS OF THE DEFENDANT'S  
11:32AM 17 SCHEME TO DEFRAUD WILL TESTIFY AS TO THE FACTS SHOWING THAT  
11:32AM 18 THEY DID NOT GET THE BENEFIT OF THEIR BARGAIN. IN OTHER WORDS,  
11:32AM 19 THAT MEANS THAT THEY'RE GOING TO TESTIFY THAT THEY SOUGHT OUT  
11:32AM 20 TESTING FROM THERANOS AND RECEIVED RESULTS BACK THAT WERE NOT  
11:32AM 21 ACCURATE. THAT IS A KEY PART OF THE PROOF IN THIS CASE, AND  
11:32AM 22 IT'S TO BE EXPECTED IN ANY FRAUD CASE THAT VICTIMS WOULD  
11:32AM 23 TESTIFY ABOUT HOW THEY CAME TO BE DEFRAUDED, HOW THEY MISSED  
11:32AM 24 OUT ON THE BENEFIT OF THEIR BARGAIN. THAT SHOULD NOT BE A  
11:32AM 25 SURPRISE TO ANYONE.

1 BY ARGUING THAT THESE FACTS ARE IRRELEVANT AND THAT THAT  
2 VICTIM TESTIMONY IS INADMISSIBLE, DEFENDANT'S MOTION IS ASKING  
3 THE COURT TO BLOCK VICTIMS OF THE CHARGED FRAUD FROM TESTIFYING  
4 AT TRIAL. I THINK IT'S IMPORTANT TO PUT THIS IN PERSPECTIVE.  
5 THAT'S WHAT THEY'RE ASKING THE COURT TO DO.

6 WHAT A WINDFALL THAT WOULD BE TO ANY DEFENDANT TO BLOCK  
7 VICTIMS FROM BEING ABLE TO COME TO THE TRIAL AND TESTIFY ABOUT  
8 THEIR EXPERIENCES BEING DEFRAUDED.

9 BUT AT THE SAME TIME WHAT A RADICAL STEP IT WOULD BE FOR A  
10 TRIAL COURT TO ISSUE THAT KIND OF EVIDENTIARY RULING.

11 I ALSO WANT TO RESPOND TO THE DEFENSE'S CHARACTERIZATION  
12 OF THIS CASE AS AN EXTREMELY BROAD CASE. THAT'S NOT TRUE,  
13 EITHER.

14 THE INDICTMENT IN THIS CASE, WHILE DETAILED, IS  
15 MANAGEABLE. IT INCLUDES A HANDFUL OF WIRE FRAUD COUNTS AND TWO  
16 CONSPIRACY COUNTS. IT'S BASED ON TWO SCHEMES TO DEFRAUD, ONE  
17 TARGETING INVESTORS, ONE TARGETING PATIENTS, AND THOSE SCHEMES  
18 SPANNED A FEW YEARS EACH. IT'S AS SIMPLE AS THAT.

19 THE FACT THAT THE COMPANY ENDED UP PERFORMING A LARGE  
20 NUMBER OF ASSAYS OVER SEVERAL YEARS DOES NOT MAKE THIS CASE  
21 BROADER THAN WHAT I JUST STATED.

22 HOLMES HERSELF AND THE COMPANY MADE BROAD CLAIMS ABOUT THE  
23 ACCURACY OF THE TESTS AND THE SUPERIORITY OF THE COMPANY'S  
24 TECHNOLOGY VERSUS CONVENTIONAL METHODS. SO, IF ANYTHING, IT'S  
25 THE SIMPLE BREADTH OF THOSE CLAIMS THAT INFORMS THE SCOPE OF

1 THE TRIAL, THE SCOPE OF THE GOVERNMENT'S ALLEGATIONS HERE.

2 I'D LIKE TO TALK BRIEFLY ABOUT THE DEFENSE'S USE OF THE  
3 WORD "ANECDOTAL." IN THIS CASE IT STRIKES THE GOVERNMENT THAT  
4 "ANECDOTAL" IS BEING USED AS A PEJORATIVE TERM IN AN EFFORT TO  
5 MINIMIZE THE VALIDITY OR THE SIGNIFICANCE OF PATIENT EXPERIENCE  
6 TESTIMONY HERE.

7 BUT SURELY THE COURT WILL RECOGNIZE THAT THE VAST MAJORITY  
8 OF WITNESS TESTIMONY IN ANY TRIAL COULD BE CHARACTERIZED AS  
9 ANECDOTAL. THIS IS WHAT 95 PERCENT OF WHAT WITNESSES DO. THEY  
10 TAKE THE STAND, THEY SWEAR TO TELL THE TRUTH, AND THEN THEY  
11 TELL THE JURY WHAT THEY EXPERIENCED. THEY TELL THE JURY WHAT  
12 THEY OBSERVED, WHAT HAPPENED TO THEM.

13 YOU COULD CHARACTERIZE THOSE AS ANECDOTES, BUT THE WAY  
14 THAT THE DEFENSE USES THAT TERM, WE BELIEVE IT'S AN EFFORT TO  
15 MINIMIZE AND TRIVIALIZE THAT TESTIMONY THAT SHOULD BE  
16 ADMISSIBLE.

17 SO HERE THE VICTIMS OF BOTH SCHEMES TO DEFRAUD WILL  
18 TESTIFY ABOUT THEIR RELEVANT EXPERIENCES AND OBSERVATIONS,  
19 STATEMENTS MADE TO THEM BY HOLMES OR THERANOS, THE ACTIONS THEY  
20 TOOK BASED ON THOSE STATEMENTS, AND THE ACTS THAT SHOW THAT  
21 THEY DIDN'T GET THE BENEFIT OF THE BARGAIN.

22 SO WHAT ABOUT THE DEFENSE'S CITED CASES CRITICIZING  
23 EVIDENCE FOR BEING MERELY ANECDOTAL?

24 SO THE DEFENDANT'S CASES IF YOU LOOK AT THEM ARE ABOUT THE  
25 SUFFICIENCY AND THE TYPE OF EVIDENCE NECESSARY GENERALLY TO

1 PROVE CAUSATION IN CIVIL CASES WHERE ISSUES LIKE CAUSATION AND  
2 DAMAGES ARE THE CORE OF THE INQUIRY.

3 AS I MENTIONED BEFORE, THIS IS NOT ONE OF THOSE CASES.  
4 THIS IS NOT A CASE WHERE CAUSATION AND DAMAGES ARE GOING TO BE  
5 THE ISSUES BEFORE THE JURY.

6 THE DEFENSE HAS CITED CASES THAT INCLUDE CASES ABOUT  
7 WHETHER A DIET DRUG CAUSED STROKES, A CASE ABOUT WHETHER A  
8 PRESCRIPTION DRUG CAUSED BLEEDING, A CASE ABOUT WHETHER A  
9 SUBSTANCE CAUSED HEPATITIS, THERE ARE CITATIONS TO THE  
10 REFERENCE MANUAL ON SCIENTIFIC EVIDENCE ARE ALSO ALL ABOUT  
11 CAUSATION CASES.

12 THIS IS NOT A CAUSATION CASE. THIS IS A FRAUD CASE WHERE  
13 THE FOCUS, AGAIN, IS ON THE DEFENDANTS'S INTENT AND WHETHER HER  
14 KNOWLEDGE OF THERANOS'S ACCURACY AND RELIABILITY PROBLEMS PUT  
15 HER ON NOTICE THAT HER REPRESENTATIONS ABOUT THE ACCURACY OF  
16 THE TESTS WERE MISLEADING AND WHETHER SHE NONETHELESS MADE  
17 THOSE MISREPRESENTATIONS WITH THE INTENT TO DECEIVE AND CHEAT  
18 PATIENT VICTIMS.

19 CAUSATION CASES IN CONTRAST RISE AND FALL ON EXPERT  
20 TESTIMONY SHOWING A LINK BETWEEN THE MANUFACTURER'S PRODUCT AND  
21 SOME HARM SUFFERED BY THE PLAINTIFFS. SO THAT'S DIFFERENT FROM  
22 AN ALLEGATION THAT THE PRODUCTS SIMPLY ISN'T AS DESCRIBED.  
23 IT'S DIFFERENT FROM THE ALLEGATION LIKE THE GOVERNMENT AS MADE  
24 HERE THAT THE DEFENDANT KNOWINGLY MISLED PEOPLE AS TO THE  
25 NATURE OF THE PRODUCT.

1 IN PRODUCTS LIABILITY CASES, IF MEMORY SERVES, INTENT IS  
2 NOT A KEY FACTOR. INSTEAD, THE PERFORMANCE OF THE PRODUCT  
3 TAKES CENTER STAGE AND STATISTICAL ANALYSIS FOR CAUSATION MIGHT  
4 BE MORE IMPORTANT, BUT AGAIN, THIS IS NOT THAT KIND OF CASE, SO  
5 DEFENDANT'S RELIANCE ON THOSE CASES IS OF LIMITED USE TO THE  
6 COURT.

7 DEFENDANT OBJECTS TO EVEN THE USE OF THE WORD "VICTIM" TO  
8 DESCRIBE THESE WITNESSES HERE. THE GOVERNMENT UNDERSTANDS THAT  
9 SHE IS INNOCENT UNTIL PROVEN GUILTY AND, OF COURSE, THE DEFENSE  
10 DOES NOT BELIEVE OR MUST ARGUE THAT A FRAUD DID NOT OCCUR HERE.

11 BUT THIS IS THE GOVERNMENT'S CASE AS CHARGED BY THE -- AND  
12 AS RETURNED BY THE GRAND JURY IN THE INDICTMENT. AND AS THE  
13 DEFENSE RECOGNIZED, IT IS THE GOVERNMENT THAT HAS THE BURDEN OF  
14 PROOF. WE'RE SIMPLY ASKING THAT THE COURT ALLOW THE GOVERNMENT  
15 THE OPPORTUNITY TO PROVE ITS CASE TO SATISFY THAT BURDEN.

16 IT'S ALSO IMPORTANT TO NOTE THAT WHILE DEFENSE'S -- WHILE  
17 THE DEFENSE'S ARGUMENTS FOCUS ON THE SUFFICIENCY OF PATIENT  
18 TESTIMONY TO SHOW THAT THERE WERE PROBLEMS WITH THERANOS'S  
19 TESTS, THAT EVIDENCE SHOULD NOT BE VIEWED IN A VACUUM EITHER AT  
20 TRIAL OR BY THE COURT DURING THIS HEARING.

21 AT TRIAL THE GOVERNMENT INTENDS TO PRESENT SEVERAL  
22 VARIETIES OF EVIDENCE THAT WILL SHOW THAT THERANOS'S TESTS  
23 SUFFERED FROM A WIDE RANGE OF ACCURACY AND RELIABILITY  
24 PROBLEMS. THOSE CATEGORIES WILL INCLUDE, FOR EXAMPLE,  
25 TESTIMONY FROM THERANOS EMPLOYEES ABOUT RECURRING PROBLEMS WITH

1 CERTAIN CATEGORIES OF THERANOS'S CLINICAL TESTS. THOSE  
2 RECURRING PROBLEMS AND THEIR EXISTENCE WILL BE CONFIRMED USING  
3 PATIENT COMPLAINTS.

4 THERE WILL ALSO BE TESTIMONY ABOUT TECHNICAL CHALLENGES  
5 SPECIFIC TO THERANOS'S TECHNOLOGY THAT THE COMPANY WAS NEVER  
6 ABLE TO OVERCOME.

7 YOU WILL HEAR TESTIMONY OR THE JURY WILL HEAR TESTIMONY  
8 ABOUT QUALITY CONTROL FAILURE RATES AND HOW THERANOS'S DEVICES  
9 FAILED QUALITY CONTROL TESTING AT A SIGNIFICANTLY HIGHER RATE  
10 THAN CONVENTIONAL DEVICES USED BY THERANOS'S EMPLOYEES.

11 THERE WILL ALSO BE INTERNAL THERANOS COMMUNICATIONS  
12 SHOWING THAT THESE PROBLEMS CAUSED THE COMPANY TO FREQUENTLY  
13 WITHDRAW TEST RESULTS, TEMPORARILY STOP OFFERING CERTAIN  
14 ASSAYS, SWITCH DEVICES USED TO PERFORM CERTAIN ASSAYS OR  
15 CONSIDER ALTERING THE WAY THAT THEY'VE DESCRIBED A GIVEN ASSAY.

16 THE GOVERNMENT INSPECTORS, REGULATORY INSPECTORS WILL  
17 TESTIFY ABOUT DEFICIENCIES IN THERANOS'S LAB PRACTICES,  
18 DEFICIENCIES THAT WOULD NEGATIVELY IMPACT ACCURACY OF THE  
19 TESTS.

20 FINALLY, THERE WILL BE EVIDENCE OF THERANOS'S ULTIMATE  
21 VOIDING OF A LARGE PERCENTAGE OF ITS CLINICAL TEST, A STEP THAT  
22 WOULD NOT BE NECESSARY IF THERE WERE NO REASON TO DOUBT THE  
23 ACCURACY AND THE MERIT OF THOSE TEST RESULTS.

24 SO IN THE CONTEXT OF THE OTHER EVIDENCE, THE EXISTENCE OF  
25 INDIVIDUAL DEMONSTRABLY INACCURATE PATIENT TEST RESULTS IT



11:40AM 1 CERTAINLY IS RELEVANT AND IT EASILY MEETS THE TEST UNDER  
11:40AM 2 FEDERAL RULE OF EVIDENCE 401 BECAUSE EVIDENCE OF THOSE  
11:40AM 3 INACCURATE RESULTS HAS A TENDENCY TO MAKE A FACT OF CONSEQUENCE  
11:40AM 4 IN THIS CASE MORE OR LESS PROBABLE CAUSE THAN IT WOULD BE  
11:40AM 5 WITHOUT THE EVIDENCE.

11:40AM 6 SPECIFICALLY, THE FACT OF CONSEQUENCE BEING THERANOS'S  
11:40AM 7 ACCURACY PROBLEMS AND THE DEFENDANT'S KNOWLEDGE OF THOSE  
11:40AM 8 ACCURACY PROBLEMS.

11:40AM 9 I LOOKED AT RULE 401, AND I NOTICED THE ADVISORY COMMITTEE  
11:40AM 10 NOTES HAS SOME VERY HELPFUL LANGUAGE ALSO THAT I WANTED TO  
11:40AM 11 SHARE. THE ADVISORY COMMITTEE NOTES SAYS FOR 401, THE STANDARD  
11:40AM 12 FOR PROBABILITY UNDER THE RULE IS, QUOTE, "MORE PROBABLE THAN  
11:40AM 13 IT WOULD BE WITHOUT THE EVIDENCE. ANY MORE STRINGENT  
11:41AM 14 REQUIREMENT IS UNWORKABLE AND UNREALISTIC." AND THEN IT QUOTES  
11:41AM 15 THE SAYING "A BRICK IS NOT A WALL. IT IS NOT TO BE SUPPOSED  
11:41AM 16 THAT EVERY WITNESS CAN MAKE A HOME RUN."

11:41AM 17 SO I THINK THE DEFENSE, AGAIN, WANTS THE COURT TO VIEW THE  
11:41AM 18 OFFERED WITNESS TESTIMONY IN A VACUUM AND ASK THE QUESTION,  
11:41AM 19 WOULD THIS TESTIMONY, WOULD THIS EVIDENCE STANDING ON ITS OWN  
11:41AM 20 CONCLUSIVELY PROVE THAT THERANOS'S TESTS HAD ACCURACY PROBLEMS,  
11:41AM 21 THAT THOSE TESTS WERE INACCURATE?

11:41AM 22 BUT THAT'S NOT THE CORRECT QUESTION. THE CORRECT QUESTION  
11:41AM 23 IS WHETHER THAT EVIDENCE TENDS TO MAKE THAT KEY QUESTION OR  
11:41AM 24 THAT KEY FACT MORE OR LESS PROBABLE, AND CERTAINLY THE ANSWER  
11:41AM 25 MUST BE YES.

11:41AM 1 IT SHOULD ALSO BE NOTED THAT SOME OF THESE PATIENT  
11:41AM 2 EXPERIENCES ARE ESPECIALLY PROBATIVE NOT JUST BECAUSE THEY  
11:41AM 3 EVIDENCE THE EXISTENCE OF PROVABLE FALSE RESULTS, BUT ALSO  
11:41AM 4 BECAUSE OF THE NATURE OF THOSE RESULTS.

11:41AM 5 SO, FOR EXAMPLE, AS THE DEFENSE KNOWS, MULTIPLE  
11:41AM 6 OBSTETRICIANS THAT THE GOVERNMENT HAS SPOKEN TO HAVE SAID THAT  
11:42AM 7 THEY ENCOUNTERED PROBLEMS WITH THERANOS'S HCG TEST THAT THEY  
11:42AM 8 DIDN'T SEE IN THEIR MANY YEARS OF USING CONVENTIONAL LABS.  
11:42AM 9 THAT IS VALUABLE COMPARISON INFORMATION THAT, AGAIN, SHOWS THAT  
11:42AM 10 THERANOS'S TESTS SUFFERED FROM PROBLEMS UNIQUE TO THE COMPANY.  
11:42AM 11 AND, AGAIN, UNDER RULE 401, THAT IS RELEVANT AND ADMISSIBLE  
11:42AM 12 EVIDENCE.

11:42AM 13 SIMILARLY, ONE PRACTITIONER INFORMED THE GOVERNMENT THAT  
11:42AM 14 SHE GOT IMPOSSIBLE TESTOSTERONE RESULTS FROM THERANOS FROM  
11:42AM 15 MULTIPLE PATIENTS AFTER NOT GETTING OR NOT HAVING THOSE  
11:42AM 16 PROBLEMS WITH OTHER LABS IN THE PAST.

11:42AM 17 FINALLY, ONE OF THE GOVERNMENT'S ANTICIPATED WITNESSES AND  
11:42AM 18 THE BASIS OF AN INDICTED COUNT GOT TWO IMPOSSIBLE PROSTATE TEST  
11:42AM 19 RESULTS. OUT OF THREE THERANOS TESTS, TWO OF THEM WERE  
11:42AM 20 PROVABLY FALSE.

11:42AM 21 SO AGAIN, THIS REALLY UNDERCUTS THE DEFENDANT'S CLAIM  
11:42AM 22 ABOUT THE .1 PERCENT TO 3 PERCENT FAILURE RATE THAT THEY WOULD  
11:43AM 23 EXPECT TO SEE IN ALL LABORATORY TESTING.

11:43AM 24 WHEN WE SEE PATIENTS GETTING TESTS AND SEEING ERRORS THAT  
11:43AM 25 DID NOT OCCUR WITH OTHER LABS, WHEN WE SEE PATIENTS GETTING

11:43AM 1 MULTIPLE ERRONEOUS RESULTS FROM IT THERANOS IN A SHORT PERIOD  
11:43AM 2 OF TIME, THAT DOES TEND TO SHOW THAT THERANOS'S TESTS SUFFERED  
11:43AM 3 FROM ACCURACY AND RELIABILITY PROBLEMS AS CHARGED IN THE  
11:43AM 4 INDICTMENT.

11:43AM 5 I'LL MOVE ON NEXT TO THE LIS, BUT I WANTED TO PAUSE AND  
11:43AM 6 SEE IF THE COURT HAS ANY QUESTIONS ON THE POINTS I HAVE MADE SO  
11:43AM 7 FAR.

11:43AM 8 THE COURT: WELL, I DID HAVE A QUESTION. I DON'T  
11:43AM 9 KNOW IF IT'S APPROPRIATE NOW. THERE IS A SEPARATE STANDALONE  
11:43AM 10 MOTION REGARDING THE ADMISSIBILITY OF PATIENT EXPERIENCES AND  
11:43AM 11 PERSONAL EXPERIENCES.

11:43AM 12 MR. WADE TOUCHED A LITTLE BIT ABOUT THAT IN HIS  
11:43AM 13 PRESENTATION. I DON'T KNOW IF YOU WANT TO SPEAK TO THAT OR IF  
11:43AM 14 YOU WOULD PREFER TO WAIT UNTIL THAT MOTION IS BEFORE THE COURT.

11:43AM 15 MR. BOSTIC: SO, YOUR HONOR, I AM NOT THE AUSA WHO  
11:44AM 16 WILL BE HANDLING THAT ARGUMENT, SO RESPECTFULLY I WOULD LIKE TO  
11:44AM 17 DEFER TO MY COLLEAGUE ON THAT ONE.

11:44AM 18 THE COURT: SURE.

11:44AM 19 MR. BOSTIC: BUT I WILL SAY AS TO RULE 403 AND  
11:44AM 20 PATIENT HARM, THE GOVERNMENT IS AWARE OF RULE 403, OF COURSE.  
11:44AM 21 AND AS I MENTIONED BEFORE, THE PURPOSE OF THE VICTIM TESTIMONY  
11:44AM 22 HERE IS TO PROVIDE CONCRETE EXAMPLES OF INSTANCES WHERE  
11:44AM 23 PATIENTS, CUSTOMERS, VICTIMS OF THE ALLEGED FRAUD RECEIVED  
11:44AM 24 INACCURATE TEST RESULTS FROM THERANOS. THAT MUST BE RELEVANT.

11:44AM 25 I SHOULD ALSO RESPOND TO MR. WADE'S ALLEGATION THAT THE

1 GOVERNMENT SEEKS TO ADMIT THIS EVIDENCE BECAUSE OF ITS  
2 EMOTIONAL CONTENT. THAT SIMPLY IS NOT TRUE. AND IT'S PROVABLE  
3 OR THAT FACT IS PROVABLE IF THE GOVERNMENT -- I'M SORRY, OR IF  
4 THE COURT LOOKS AT WHICH WITNESSES THE GOVERNMENT HAS SELECTED  
5 TO TESTIFY.

6 FOR EXAMPLE, THE PATIENT THAT I MENTIONED A MOMENT AGO WHO  
7 RECEIVED THE INACCURATE PROSTATE TEST RESULTS TOLD US THAT  
8 THOSE RESULTS DIDN'T CONCERN HIM BECAUSE HIS DOCTOR KNEW FROM  
9 THE FIRST LOOK THAT THOSE RESULTS WERE INACCURATE. SO THERE'S  
10 NO COMPONENT IN THAT STORY WHERE THAT PATIENT WORRIED THAT HE  
11 WAS ILL OR HE WAS GOING TO DIE. THERE WAS NO SIGNIFICANT  
12 EMOTIONAL DISTRESS STEMMING FROM THAT, AND YET THAT PATIENT IS  
13 A BASIS OF ONE OF THE COUNTS IN THE GOVERNMENT'S INDICTMENT.

14 SIMILARLY, THE DOCTOR THAT I MENTIONED WHO GOT A NUMBER OF  
15 INACCURATE TESTOSTERONE RESULTS FROM THERANOS INDICATED THAT  
16 SHE DIDN'T MAKE ANY TREATMENT CHANGES TO HER PATIENTS BASED ON  
17 THOSE INACCURATE RESULTS. SO THOSE PATIENTS WERE ALSO NOT  
18 HARMED BY THE INACCURATE RESULTS THAT THERANOS SENT OUT.

19 DOES THE GOVERNMENT CONCEDE THE DEFENSE'S CLAIM THAT THIS  
20 HARM NEVER OCCURRED TO ANY PATIENT?

21 OF COURSE NOT. THERE'S NO REASON TO BELIEVE THAT,  
22 ESPECIALLY GIVEN THE NUMBER OF PATIENTS AND THE NUMBER OF TESTS  
23 THAT THERANOS DID WHILE EXPERIENCING THESE ACCURACY PROBLEMS.

24 BUT THE GOVERNMENT'S SELECTION OF WITNESSES FOR THIS TRIAL  
25 DOES NOT FOCUS ON PRESENTING WITNESSES WHO HAVE EXPERIENCED

11:46AM 1 THAT KIND OF TRAUMA.

11:46AM 2 THE COURT: ALL RIGHT. THANK YOU.

11:46AM 3 IF YOU WANT TO -- BEFORE YOU MOVE TO THE LIS CONVERSATION,  
11:46AM 4 AND I THINK YOU'LL TALK ABOUT IN YOUR PORTION YOU'LL TALK ABOUT  
11:46AM 5 MY QUESTION ABOUT WEIGHT VERSUS ADMISSIBILITY.

11:46AM 6 BUT GOVERNMENT 10 SEEMS TO BE SOMEWHAT RELATED TO THIS,  
11:46AM 7 AND, THAT IS, AND I THINK THE PHRASE IS THERE'S A LOT OF 404(B)  
11:46AM 8 LANGUAGE IN THE PLEADINGS HERE AND ATTACHED TO SOME OF THE  
11:46AM 9 EVIDENCE.

11:46AM 10 I THINK GOVERNMENT 10 SAYS THAT THIS EVIDENCE IS  
11:46AM 11 INEXTRICABLY INTERTWINED? IS THAT THE GOVERNMENT'S POSITION?  
11:46AM 12 AND IF SO, MAYBE YOU CAN TALK ABOUT THAT FOR A MOMENT.

11:46AM 13 MR. BOSTIC: IT IS, YOUR HONOR.

11:46AM 14 IS THE COURT SPECIFICALLY ASKING ABOUT PATIENTS WHO IT SO  
11:46AM 15 HAPPENED DID NOT PAY FOR THE TESTS THAT THEY RECEIVED?

11:47AM 16 THE COURT: RIGHT, THEY WERE NONPAYING. AND THE  
11:47AM 17 COURT HAS ALREADY RULED ON THAT AS FAR AS THE MOTION TO  
11:47AM 18 DISMISS.

11:47AM 19 BUT I THINK THE GOVERNMENT IS SAYING THAT THAT EVIDENCE IS  
11:47AM 20 NONETHELESS RELEVANT AND THE GOVERNMENT WOULD NOT IDENTIFY  
11:47AM 21 THOSE INDIVIDUALS AS VICTIMS, BUT THEIR TESTIMONY HAS RELEVANCE  
11:47AM 22 BECAUSE IT SEEMS YOU'RE SUGGESTING THAT THAT COMMENT IS  
11:47AM 23 INEXTRICABLY INTERTWINED WITH THE SCHEME, THE FRAUD?

11:47AM 24 MR. BOSTIC: CORRECT, YOUR HONOR. YES, I WILL  
11:47AM 25 EXPLAIN THAT.

11:47AM 1 LET ME START BY SAYING THAT THE GOVERNMENT ABSOLUTELY  
11:47AM 2 ACCEPTS THE COURT'S RULING AND IS NOT SEEKING TO UNDERMINE IT  
11:47AM 3 THAT INDIVIDUALS WHO DID NOT PAY OUT OF POCKET FOR THERANOS  
11:47AM 4 TEST RESULTS ARE NOT VICTIMS IN THIS CASE.

11:47AM 5 THAT IS TO SAY, THEY DID NOT END UP BECOMING VICTIMS OF  
11:47AM 6 DEFENDANT'S SCHEME TO DEFRAUD. INDIVIDUALS WHO RECEIVED  
11:47AM 7 THERANOS TESTS BUT WHERE THOSE TESTS WERE EITHER FREE OR WERE  
11:48AM 8 PAID FOR BY INSURANCE WERE INTENDED VICTIMS OF THAT SAME SCHEME  
11:48AM 9 TO DEFRAUD, BUT IT TURNED OUT THAT THEY ENDED UP NOT BEING  
11:48AM 10 SEPARATED FROM THEIR MONEY, SO THEY ENDED UP NOT BEING ACTUAL  
11:48AM 11 VICTIMS OF A COMPLETED FRAUD UNDER THE COURT'S RULING AND  
11:48AM 12 REASONING.

11:48AM 13 SO THE GOVERNMENT ACCEPTS THAT.

11:48AM 14 BUT BECAUSE INDIVIDUALS WHO RECEIVED UNRELIABLE TESTS FROM  
11:48AM 15 THERANOS, EVEN WITHOUT PAYING, WERE VICTIMS OF OR WERE INTENDED  
11:48AM 16 VICTIMS OF THAT SCHEME TO DEFRAUD, THEIR EXPERIENCES ARE  
11:48AM 17 SIMILARLY RELEVANT.

11:48AM 18 THE CONDUCT OF DEFENDANT TOWARDS THOSE VICTIMS, EXCUSE ME,  
11:48AM 19 TOWARDS THOSE PATIENTS IS STILL RELEVANT BECAUSE IT WAS ALL  
11:48AM 20 DONE IN THE SAME COURSE OF CONDUCT DURING WHICH THE PAYING  
11:48AM 21 PATIENTS WERE DEFRAUDED.

11:48AM 22 SO THE NONPAYING PATIENTS HEARD THE SAME ADVERTISING  
11:48AM 23 MATERIALS, THEY WERE EXPOSED TO THE SAME PROMOTIONAL CLAIMS  
11:48AM 24 FROM THERANOS, THEY MADE SIMILAR DECISIONS ABOUT RELYING ON  
11:49AM 25 THOSE CLAIMS TO PATRONIZE THERANOS, AND TO THE EXTENT THAT THEY

1 RECEIVED DEMONSTRABLY INACCURATE TEST RESULTS, THE EXISTENCE OF  
2 THOSE INACCURATE RESULTS IS PROOF FIRST THAT THERANOS HAD  
3 ACCURACY AND RELIABILITY PROBLEMS. AND TO THE EXTENT THAT  
4 THERANOS WAS THEN INFORMED OF THOSE SPECIFIC ERRORS, WHICH THEY  
5 WERE IN MANY CASES, IT'S PROOF OF THERANOS'S COLLECTIVE  
6 KNOWLEDGE OF THOSE ACCURACY PROBLEMS AND DEFENDANT'S KNOWLEDGE  
7 SPECIFICALLY.

8 THE COURT: THANK YOU.

9 MR. BOSTIC: WE SHOULD TALK ABOUT THE LIS.

10 FIRST, LET'S TALK ABOUT WHAT THE LIS WAS AND WHAT IT WAS  
11 NOT. I THINK THE DEFENSE HAS BEEN HELPFUL TO A DEGREE IN  
12 EXPLAINING WHAT DATA SPECIFICALLY WAS IN THAT LIS.

13 THE COURT WILL NOTE, THOUGH, THAT NOWHERE IN THE LIS DATA  
14 WAS THERE A COLUMN OR A FIELD THAT WOULD INDICATE WHETHER A  
15 GIVEN RESULT WAS ACCURATE OR INACCURATE.

16 SO TO THE EXTENT THAT THE LIS IS BEING HELD OUT AS  
17 SUFFICIENT TO ANSWER THE QUESTION HOW MANY THERANOS TESTS WERE  
18 INACCURATE, THERE'S NO REASON TO THINK THAT THE LIS WOULD HAVE  
19 BEEN ABLE TO DO THAT.

20 IT CERTAINLY WOULD HAVE BEEN A POWERFUL TOOL TO USE IN THE  
21 GOVERNMENT'S INVESTIGATION. THE LIS WOULD HAVE BEEN USEFUL TO  
22 HELP IDENTIFY PATIENT VICTIMS. IT WOULD HAVE PROVIDED A  
23 GREATER OVERVIEW OF WHICH ASSAYS THERANOS WAS RUNNING AND WHEN,  
24 AND OW MANY OF THE GIVEN ASSAY TYPE WERE RUN DURING A RELEVANT  
25 TIME PERIOD.

1 BUT THE GOVERNMENT HAS BEEN ABLE TO CAPTURE THAT  
2 INFORMATION IN VARIOUS OTHER WAYS. SOME REPORTS WERE RUN FROM  
3 THE LIS SYSTEM BEFORE IT WAS SHUT DOWN.

4 THE GOVERNMENT ALSO HAS EQUIVALENT INFORMATION FROM THE  
5 LAB REPORTS THEMSELVES, FROM EMPLOYEE TESTIMONY ABOUT HOW TESTS  
6 WERE RUN AT VARIOUS TIMES AND SOME OTHER THERANOS RECORDS.

7 SO THE TYPE OF INFORMATION THAT WAS CAPTURED IN THE LIS IN  
8 ONE PLACE HAS, THANKFULLY, BEEN PRESERVED IN PART ELSEWHERE IN  
9 THE MATERIALS OBTAINED BY THE GOVERNMENT.

10 IN ADDITION, THE LIS CONTAINED QUALITY CONTROL DATA THAT  
11 WOULD PROVIDE MORE INFORMATION ABOUT HOW FREQUENTLY THERANOS'S  
12 DEVICES FAILED THAT QUALITY CONTROL EVALUATION THAT WAS DONE  
13 SEPARATE FROM THE ACTUAL CLINICAL TESTING.

14 BUT, AGAIN, THE LIS DID NOT INDICATE WHICH RESULTS WERE  
15 ACCURATE AND WHICH WERE INACCURATE. SO THE LIS WOULD NOT HAVE  
16 BEEN THE TOOL THAT EITHER SIDE COULD USE TO DETERMINE THE  
17 OVERALL FAILURE RATE OR THE OVERALL ERROR RATE OF THERANOS'S  
18 TESTS, BUT THAT'S OKAY BECAUSE THIS CASE IS NOT ABOUT OVERALL  
19 FAILURE RATE. THIS IS NOT ABOUT DETERMINING WHAT PERCENTAGE OF  
20 THERANOS'S TESTS WERE INACCURATE AND HOLDING THAT UP AGAINST  
21 SOME KIND OF INDUSTRY STANDARD.

22 INSTEAD, THIS IS A WIRE FRAUD CASE. THE DEFENDANT  
23 REPRESENTED THAT THE TESTS WERE ACCURATE AND RELIABLE KNOWING  
24 THAT THEY HAD THESE PROBLEMS, AND IT WILL BE UP TO THE JURY TO  
25 DECIDE WHETHER HER KNOWLEDGE OF THOSE PROBLEMS, AGAIN, PUT HER



11:52AM 1 ON NOTICE THAT THOSE REPRESENTATIONS WERE MISLEADING AND  
11:52AM 2 WHETHER SHE MADE THOSE REPRESENTATIONS TO DEFRAUD.

11:52AM 3 IT'S ALSO I THINK IMPORTANT TO NOTE THAT EVEN IF THE LIS  
11:52AM 4 WERE CAPABLE OF PRODUCING AN ESTIMATED FAILURE RATE AND OVERALL  
11:52AM 5 FAILURE RATE FOR THE LAB TESTS DONE BY THERANOS, THE DEFENSE  
11:52AM 6 WOULD STILL BE ARGUING THAT THIS INFORMATION WAS IRRELEVANT TO  
11:52AM 7 A WIRE FRAUD CASE, AND ARGUABLY CORRECTLY SO, BECAUSE THEY  
11:52AM 8 WOULD BE ARGUING THAT UNLESS HOLMES HAS DONE THAT SAME ANALYSIS  
11:52AM 9 AND HAD BEEN AWARE OF THAT OVERALL FAILURE RATE, THAT IT  
11:52AM 10 WOULDN'T BE RELEVANT TO HER INTENT TO DEFRAUD IN THIS CRIMINAL  
11:52AM 11 CASE.

11:52AM 12 SO I THINK WHEN THE DEFENSE HOLDS OUT THE LIS AS A  
11:52AM 13 CRITICAL PIECE OF EVIDENCE, THE EVIDENCE THAT THE GOVERNMENT  
11:52AM 14 COULD USE TO PROVE ITS CASE, I THINK THAT'S A STRAW MAN  
11:52AM 15 ARGUMENT. THE LIS WAS NOT CRITICAL TO THE CHARGING IN THIS  
11:53AM 16 CASE NOR IS IT CRITICAL TO THE PROOF AT TRIAL.

11:53AM 17 WHEN IT COMES TO BLAME FOR THE LOSS OF THE LIS. AS THE  
11:53AM 18 COURT CAN TELL, THIS IS A VERY HOTLY DEBATED FACTUAL DISPUTE.  
11:53AM 19 THE GOVERNMENT'S OPPOSITION DISCUSSED DESTRUCTION OF THE  
11:53AM 20 LIS DATABASE BECAUSE THE GOVERNMENT BELIEVES THAT THOSE FACTS  
11:53AM 21 WERE IMPORTANT BACKGROUND FOR THE COURT TO KEEP IN MIND WHEN  
11:53AM 22 WEIGHING THE DEFENSE'S ATTEMPT TO REMOVE PATIENT TESTIMONY FROM  
11:53AM 23 TRIAL.

11:53AM 24 THE DEFENDANT ARGUES THAT THE GOVERNMENT'S CASE IS DOOMED  
11:53AM 25 BY A LACK OF STATISTICAL ANALYSIS ACCOUNTING FOR ALL OF

11:53AM 1 THERANOS'S TEST RESULTS, BUT THAT'S SIMPLY NOT TRUE. THE  
11:53AM 2 ELEMENTS IN THE CASE LAW DON'T REQUIRE THAT KIND OF STATISTICAL  
11:53AM 3 ANALYSIS IN THIS CASE.

11:53AM 4 WHEN IT COMES TO WHOSE FAULT IT IS THAT THE LIS IS  
11:53AM 5 MISSING, OBVIOUSLY THE PARTIES DISAGREE. THE GOVERNMENT  
11:53AM 6 ABSOLUTELY DOES NOT CONCEDE THAT IT'S THE GOVERNMENT'S FAULT  
11:54AM 7 THAT THAT EVIDENCE WAS MISSING.

11:54AM 8 I WON'T GO THROUGH THE ENTIRE STORY. I THINK THE COURT  
11:54AM 9 HAS THE BRIEFING FOR THAT. BUT IT'S IMPORTANT TO JUST REMEMBER  
11:54AM 10 A FEW KEY DATES AND KEY EVENTS.

11:54AM 11 THE DATABASE ITSELF WAS SUBPOENAED FROM THERANOS IN JUNE  
11:54AM 12 2018. I BELIEVE THE DATE WAS JUNE 4TH, 2018. THE DEFENSE  
11:54AM 13 MIGHT HAVE MISTAKENLY SAID JUNE 14TH.

11:54AM 14 THE DISCUSSIONS ABOUT RESPONDING TO THAT SUBPOENA BEGAN AT  
11:54AM 15 THERANOS WHILE THE DEFENDANT WAS STILL CEO. SO WHILE SHE WAS  
11:54AM 16 STILL RUNNING THE COMPANY, HER EMPLOYEES, HER AGENTS WERE  
11:54AM 17 DISCUSSING HOW TO RESPOND TO THAT SUBPOENA FOR THE LIS.

11:54AM 18 EVENTUALLY FOLLOWING THE INDICTMENT A PURPORTED COPY OF  
11:54AM 19 THE LIS WAS PRODUCED TO THE GOVERNMENT AT THE END OF AUGUST  
11:54AM 20 2018, AUGUST 27TH, 2018. THE DATABASE WAS COMPLETELY SHUT  
11:54AM 21 DOWN, IN OTHER WORDS, THERANOS'S COPY OF THE DATABASE WAS SHUT  
11:54AM 22 DOWN BY AUGUST 31ST, 2018.

11:54AM 23 SO WE'RE TALKING ABOUT A FOUR-DAY WINDOW BETWEEN WHEN THE  
11:55AM 24 GOVERNMENT RECEIVED WHAT IT WAS TOLD AND WHAT IT BELIEVED WAS A  
11:55AM 25 COPY OF THERANOS'S LIS DATABASE, AND WHEN THE WORKING COPY OF

11:55AM 1 THAT DATABASE, WHAT TURNED OUT FROM THE GOVERNMENT'S  
11:55AM 2 UNDERSTANDING TO BE THE ONLY WORKING COPY OF THAT DATABASE, WAS  
11:55AM 3 DESTROYED BY THERANOS, WAS DISASSEMBLED IN A WAY THAT MADE IT  
11:55AM 4 LIKELY IMPOSSIBLE FOR IT TO EVER BE RECONSTRUCTED AND ACCESSED  
11:55AM 5 AGAIN.

11:55AM 6 IN LIGHT OF THOSE FACTS, ALL OF THE DEFENSE'S ARGUMENTS  
11:55AM 7 ABOUT THE GOVERNMENT'S COUPLE WEEK DELAY BEFORE ATTEMPTING TO  
11:55AM 8 ACCESS THE DATABASE, ITS DELAY BEFORE TAKING ADDITIONAL STEPS  
11:55AM 9 TO TRY TO RECONSTRUCT THAT DATABASE, STEPS WHICH WERE  
11:55AM 10 ULTIMATELY FUTILE AND WHICH MAY HAVE BEEN DOOMED FROM THE  
11:55AM 11 START, ALL OF THOSE ARGUMENTS ARE IRRELEVANT BECAUSE IN ORDER  
11:55AM 12 FOR THE GOVERNMENT TO BE RESPONSIBLE FOR THIS LOSS, THE  
11:55AM 13 GOVERNMENT WOULD HAVE NEEDED TO HAVE KNOWN DURING THAT FOUR-DAY  
11:55AM 14 WINDOW WHEN IT STILL COULD HAVE DONE SOMETHING ABOUT IT THAT  
11:56AM 15 THE COPY IT OBTAINED WAS USELESS, BUT THE GOVERNMENT DIDN'T  
11:56AM 16 KNOW THAT DURING THAT WINDOW.

11:56AM 17 THE ONLY PEOPLE WHO KNEW THAT THAT COPY WAS INACCESSIBLE  
11:56AM 18 AND UNWORKABLE WERE INDIVIDUALS AT THERANOS, INDIVIDUALS WHO  
11:56AM 19 HAD PREVIOUSLY WORKED FOR DEFENDANT, AND INDIVIDUALS WHO WORKED  
11:56AM 20 AT A COMPANY WHERE DEFENDANT WAS STILL CHAIRMAN OF THE BOARD OF  
11:56AM 21 THAT COMPANY.

11:56AM 22 SO THERE IS A FACTUAL DISPUTE HERE. THE GOVERNMENT  
11:56AM 23 RECOGNIZES THAT.

11:56AM 24 SO THE COURT'S QUESTION WHAT SHOULD BE DONE NOW ABOUT THE  
11:56AM 25 LIS ISSUE, I THINK THE GOVERNMENT'S ANSWER IS TWOFOLD.

11:56AM 1 FIRST, TO THE EXTENT THAT THE LIS IS THE SUBJECT OF  
11:56AM 2 ANOTHER MOTION IN LIMINE, WITH THE COURT'S PERMISSION, I'LL  
11:56AM 3 DEFER TO MY COLLEAGUE WHO WILL COVER THAT MOTION, BUT I SUSPECT  
11:56AM 4 THE GOVERNMENT'S ANSWER WILL BE THAT ITS INVESTIGATION  
11:56AM 5 REGARDING THE LIS AND RESPONSIBILITY FOR ITS DESTRUCTION IS  
11:56AM 6 ONGOING.

11:56AM 7 SO WE DON'T YET KNOW THE NATURE OF EVIDENCE THAT WOULD BE  
11:56AM 8 PRESENTED AT TRIAL. NO ONE HAS BEEN CHARGED WITH OBSTRUCTION  
11:57AM 9 IN THIS CASE. SO IT'S PREMATURE, I THINK, TO DECIDE WHETHER  
11:57AM 10 THAT ISSUE WILL BE PART OF THIS TRIAL OR NOT. I THINK WE NEED  
11:57AM 11 TO WAIT AND SEE WHERE THAT INVESTIGATION GOES.

11:57AM 12 AS TO THIS SPECIFIC MOTION AND WHETHER PATIENT TESTIMONY  
11:57AM 13 SHOULD COME IN, THE COURT DOES NOT NEED TO TAKE A SIDE ON THE  
11:57AM 14 LIS ISSUE, DOES NOT NEED TO RESOLVE THAT DISPUTE IN ORDER TO  
11:57AM 15 DECIDE THE MOTION THAT IS IN FRONT OF IT. THE GOVERNMENT WOULD  
11:57AM 16 URGE THE COURT TO FOCUS ON THE IMPORTANCE OF THAT TESTIMONY AND  
11:57AM 17 THE REASONS FOR ITS ADMISSIBILITY SEPARATE FROM THE LIS ISSUE.

11:57AM 18 THE COURT: THANK YOU. THAT WAS GOING TO BE MY  
11:57AM 19 QUESTION IS WHETHER FOR THIS MOTION THE LIS CAN BE PARSED OUT  
11:57AM 20 AND SEPARATED?

11:57AM 21 MR. DOWNEY GAVE AN OVERARCHING COMMENT ABOUT THE LIS AND  
11:57AM 22 WHY IT'S SO IMPORTANT AND WHY THE RESULTS OF ANECDOTAL, HE USED  
11:57AM 23 THE WORD "ANECDOTAL," SUGGESTS THAT IT'S JUST NOT ENOUGH.

11:58AM 24 AND I ASKED HIM ABOUT THE WEIGHT. AND WE HAD A BREAK, AND  
11:58AM 25 HE HAD PLENTY OF TIME TO THINK ABOUT THAT QUESTION.

11:58AM 1 WHAT IS YOUR RESPONSE? IS THIS REALLY A WEIGHT ISSUE AS  
11:58AM 2 OPPOSED TO AN ADMISSIBILITY ISSUE? AND IF SO, WHY?

11:58AM 3 MR. BOSTIC: IT ABSOLUTELY IS A WEIGHT ISSUE,  
11:58AM 4 YOUR HONOR. AND I THINK THE COURT CORRECTLY RECOGNIZED THAT  
11:58AM 5 THE ARGUMENTS THAT THE DEFENSE IS MAKING ARE THE ARGUMENTS THAT  
11:58AM 6 IT CAN MAKE EITHER IN A RULE 29 MOTION IN ITS CROSS-EXAMINATION  
11:58AM 7 OF GOVERNMENT WITNESSES OR IN IT'S CLOSING REMARKS TO THE JURY.

11:58AM 8 THESE ARE QUESTIONS FOR THE JURY TO DECIDE: WHAT IS THE  
11:58AM 9 IMPORT OF THIS PERSON'S TESTIMONY? WHAT CONCLUSIONS SHOULD I  
11:58AM 10 DRAW FROM IT? HOW MUCH WEIGHT CAN I GIVE IT.

11:58AM 11 WHEN IT COMES TO ADMISSIBILITY, THOUGH, I THINK RULE 401  
11:58AM 12 IS CLEAR. THOSE SAME ADVISORY NOTES FROM RULE 401 SAY THAT  
11:58AM 13 DEALING WITH PROBABILITY IS THE LANGUAGE OF THE RULE HAS THE  
11:59AM 14 ADDED BENEFIT OF AVOIDING CONFUSION BETWEEN QUESTIONS OF  
11:59AM 15 ADMISSIBILITY AND QUESTIONS OF THE SUFFICIENCY OF THE EVIDENCE,  
11:59AM 16 AND I THINK THAT'S THE ERROR THAT THE DEFENSE HAS MADE IN ITS  
11:59AM 17 ARGUMENT.

11:59AM 18 I THINK THEY'RE FOCUSING ON THE SUFFICIENCY OF THE  
11:59AM 19 EVIDENCE WHERE ADMISSIBILITY REALLY IS THE KEY QUESTION HERE.  
11:59AM 20 THESE ARE THE BRICKS THAT MAKE UP THE GOVERNMENT'S PROOF. THEY  
11:59AM 21 ARE NOT THE WALL.

11:59AM 22 MR. WADE: BRIEFLY, YOUR HONOR. I SHOULD MAKE CLEAR  
11:59AM 23 THAT MR. WADE WAS WHO MADE THAT ARGUMENT. I DON'T WANT IT  
11:59AM 24 ATTRIBUTED TO MR. DOWNEY IN THE ANNALS OF HISTORY AND HAVE HIM  
11:59AM 25 SUFFER FROM MY DEFICIENT ARGUMENT.

11:59AM 1 LABELLING SOMEONE AS A VICTIM DOES NOT MAKE IT SO. ONE IS  
12:00PM 2 A VICTIM IF YOU ESTABLISH THAT THEY'RE A VICTIM. WE AGREE WITH  
12:00PM 3 THE GOVERNMENT THAT THERE'S A FRAUD, THAT THIS CASE INVOLVES  
12:00PM 4 WIRE FRAUD.

12:00PM 5 SO THE QUESTION THAT IS AT ISSUE HERE IS WHETHER IN THE  
12:00PM 6 TERMS OF THE INDICTMENT THE THERANOS TECHNOLOGY CAUSED THE WIRE  
12:00PM 7 FRAUD, CAUSED THE ERRONEOUS RESULT. THAT'S WHAT IS SET FORTH  
12:00PM 8 IN THE INDICTMENT.

12:00PM 9 THE GOVERNMENT SAID -- IGNORES THE FIRST HALF AND SAYS  
12:00PM 10 THERE'S AN ERRONEOUS RESULT THAT HAPPENED AT THERANOS, BUT YOU  
12:00PM 11 HAVE TO SHOW THE CONNECTION BETWEEN THE TWO TO ESTABLISH THAT  
12:00PM 12 IT'S A VICTIM.

12:00PM 13 WE'RE NOT TRYING TO PREVENT AN ACTUAL VICTIM FROM OFFERING  
12:00PM 14 TESTIMONY.

12:00PM 15 THE COURT: SO IS IT JUST THE NOMENCLATURE? IF A  
12:00PM 16 PERSON IS CALLED -- IF WITNESS A IS CALLED, AND IF HE OR SHE IS  
12:00PM 17 JUST CALLED A PATIENT, A CLIENT, IS THAT ALL RIGHT THEN WITHOUT  
12:00PM 18 CALLING THEM A VICTIM?

12:00PM 19 MR. WADE: NO. THE EVIDENCE IS IRRELEVANT FOR ALL  
12:01PM 20 OF THE REASONS THAT I JUST SUGGESTED, BUT WHAT THE GOVERNMENT  
12:01PM 21 IS DOING IS LABELLING THIS TESTIMONY AS VICTIM TESTIMONY AND  
12:01PM 22 SORT OF CREATING A SPECIAL BUBBLE AROUND IT AND SUGGESTING THAT  
12:01PM 23 YOU COULDN'T POSSIBLY PRECLUDE VICTIM TESTIMONY.

12:01PM 24 WELL, IT'S ONLY VICTIM TESTIMONY IF THEY'RE DEPRIVED OF --  
12:01PM 25 THE GOVERNMENT USED THE WORD "PRODUCT." IT'S NOT A PRODUCT,

12:01PM 1 IT'S A SERVICE.

12:01PM 2 THE COURT: WELL, THEY'RE FACT WITNESSES, AREN'T  
12:01PM 3 THEY? AREN'T THEY FACT WITNESSES?

12:01PM 4 THE GOVERNMENT CALLS WITNESSES TO PROVE THEIR CASE, AND  
12:01PM 5 THE PURPOSE OF THE TRIAL IS TO TEST THE EVIDENCE. AND THESE  
12:01PM 6 ARE FACT WITNESSES WHO WILL SAY WHATEVER THEY SAID AND WHATEVER  
12:01PM 7 THEIR CONNECTION WITH YOUR CLIENT'S COMPANY WAS, AND THEY WILL  
12:01PM 8 BE DIRECT EXAMINED, AND THEN YOU'LL CROSS-EXAMINE THEM, AND  
12:01PM 9 THEN THE JURY WILL HAVE TO DECIDE HOW MUCH WEIGHT TO GIVE TO  
12:01PM 10 THEIR TESTIMONY AND THEIR EXPERIENCE.

12:01PM 11 MR. WADE: AGAIN, IT'S AN INVITATION TO ERROR,  
12:01PM 12 YOUR HONOR, BECAUSE THEY'RE PROFFERING TESTIMONY THAT THEY  
12:01PM 13 HAVEN'T ESTABLISHED IS RELEVANT.

12:01PM 14 YOU HAVE TO ESTABLISH THAT THERE'S A THRESHOLD RELEVANCE  
12:01PM 15 TO THE EVIDENCE BEFORE YOU PUT US TO THE BURDEN OF CHALLENGING  
12:02PM 16 THAT EVIDENCE, BEFORE YOU PUT MS. HOLMES TO THAT BURDEN.

12:02PM 17 THE COURT: I SEE.

12:02PM 18 MR. WADE: THEY HAVEN'T ESTABLISHED THAT BECAUSE  
12:02PM 19 THERE'S NO CAUSAL CONNECTION.

12:02PM 20 THE COURT: SO YOUR ARGUMENT -- I FAILED TO ASK  
12:02PM 21 MR. BOSTIC. MAYBE HE'LL STAND IN RESPONSE TO THIS. IT SOUNDS  
12:02PM 22 LIKE YOU'RE SAYING THERE'S BURDEN SHIFTING HERE.

12:02PM 23 MR. WADE: THERE'S CLEARLY BURDEN SHIFTING BECAUSE,  
12:02PM 24 YOUR HONOR, FOR IT TO BE RELEVANT, THEY HAVE TO SHOW -- AGAIN,  
12:02PM 25 THE SERVICES ARE MULTI FACETTED.

1 SO LET'S SAY THE RESULT THAT -- THE ERRONEOUS RESULT WAS  
2 CAUSED BY THE FACT THAT THE BLOOD SAT FOR A DAY AT 110 DEGREE  
3 HEAT IN PHOENIX BEFORE IT MADE ITS WAY TO -- WE DON'T HAVE ANY  
4 WAY TO KNOW THAT BECAUSE WE DON'T HAVE THE EVIDENCE THAT WOULD  
5 SHOW SORT OF THE AUDIT TRAIL, THE CHAIN OF CUSTODY.

6 THE GOVERNMENT ASSUMES THAT BECAUSE THERE'S AN ERROR, IT'S  
7 THE RESULT OF THERANOS BECAUSE THEY GOT THE TEST AT THERANOS.  
8 ACTUALLY, THEY ASSUME BECAUSE THERE'S AN ERROR, IT'S THERANOS  
9 TECHNOLOGY AS SET FORTH IN THE INDICTMENT THAT CAUSED THE ERROR  
10 WHEREAS THERE ARE MANY OTHER ASPECTS OF THE TESTING PROCESS  
11 THAT HAVE NOTHING TO DO WITH THERANOS TECHNOLOGY.

12 THE COURT: SO MAY I STOP YOU THERE?

13 I'M GOING TO HAVE THE UNIQUE OPPORTUNITY TO ASK MR. BOSTIC  
14 TO COME TO HIS LECTERN THERE AND MAYBE JUST RESPOND TO THIS SO  
15 WE CAN HAVE A LITTLE DEBATE ABOUT THAT.

16 MR. WADE: SURE.

17 THE COURT: MR. BOSTIC, CAN YOU JUST RESPOND TO THIS  
18 LAST POINT OF MR. WADE?

19 MR. BOSTIC: YES, YOUR HONOR. I DON'T THINK THIS IS  
20 BURDEN SHIFTING. I THINK WHAT THE DEFENSE IS ASKING THE COURT  
21 TO DO IS TO PREJUDGE THE EVIDENCE. I THINK THE DEFENSE IS  
22 ASKING THE COURT TO ASSUME ITS THEORY OF THE CASE, ASSUME ITS  
23 THEORY OF THE DEFENSE, WHICH WOULD EXPLAIN AWAY ALL OF THE  
24 ACCURACY PROBLEMS AT THERANOS UNDER THE GUISE OF NORMAL  
25 STATISTICAL ERROR RATES IN LABORATORIES OR ERRORS IN SAMPLE



12:04PM 1 HANDLING OR WHAT HAVE YOU.

12:04PM 2 THE DEFENSE ASKED THE COURT TO BUY INTO THAT THEORY, AND  
12:04PM 3 BASED ON THAT ASSUMPTION TO ASSUME THAT INDIVIDUAL PATIENT  
12:04PM 4 TESTIMONY COULD NOT BE RELEVANT TO THE QUESTION OF WHETHER  
12:04PM 5 THERANOS HAD ACCURACY AND RELIABILITY PROBLEMS.

12:04PM 6 AND I WANT TO EMPHASIZE AGAIN THAT THE GOVERNMENT IS NOT  
12:04PM 7 HOLDING OUT THESE PATIENTS AS CONCLUSIVE INDEPENDENT,  
12:04PM 8 STANDALONE PROOF THAT THERANOS SUFFERED FROM SYSTEMIC ACCURACY  
12:04PM 9 AND RELIABILITY PROBLEMS. THAT PROOF WILL BE ELSEWHERE IN THE  
12:04PM 10 TRIAL AND WILL CONSIST OF THE CATEGORIES THAT I MENTIONED TO  
12:04PM 11 THE COURT EARLIER.

12:04PM 12 IT WILL BE CLEAR TO THE JURY THAT THERANOS'S TESTS  
12:04PM 13 SUFFERED FROM SYSTEMIC AND GENERAL PROBLEMS ESPECIALLY AND  
12:04PM 14 SPECIFICALLY THE ASSAYS THAT ARE NAMED IN THE INDICTMENT IN  
12:04PM 15 THIS CASE.

12:04PM 16 IN THE CONTEXT OF THAT EVIDENCE, THE EXPERIENCES OF  
12:05PM 17 INDIVIDUAL PATIENTS WHO WILL SAY I'M AN EXAMPLE OF THIS, I  
12:05PM 18 RECEIVED AN INACCURATE RESULT FROM THERANOS MUST BE RELEVANT.  
12:05PM 19 HOW COULD THEY NOT BE?

12:05PM 20 THE COURT: DO YOU HAVE TO -- DOES THE GOVERNMENT  
12:05PM 21 HAVE TO DISTINGUISH WHY THE TEST WAS ERRONEOUS? DO YOU HAVE TO  
12:05PM 22 SAY THAT THIS IS A TEST THAT WAS NOT ON OUR TARMAC IN ARIZONA  
12:05PM 23 FOR 12 HOURS BEFORE IT ARRIVED? THIS WAS A TEST THAT WAS NOT  
12:05PM 24 THE RESULT OF POOR EATING OR POOR, WHATEVER, DIET OF THE  
12:05PM 25 TESTEE? DO YOU HAVE TO DO THAT?

12:05PM 1 MR. BOSTIC: YOUR HONOR, FIRST, I THINK IT WOULD BE  
12:05PM 2 IMPOSSIBLE FOR THE GOVERNMENT TO PROVE NOT JUST THOSE NEGATIVES  
12:05PM 3 BUT EVERY CONCEIVABLE NEGATIVE IN THE CASE OF EVERY PATIENT  
12:05PM 4 TEST RESULT.

12:05PM 5 IF THAT WERE THE STANDARD, THEN, YES, NO PATIENT COULD  
12:05PM 6 TESTIFY BECAUSE THERE WOULD ALWAYS BE A QUESTION ABOUT WHAT  
12:05PM 7 MIGHT HAVE SPECULATIVELY HAPPENED TO THAT SAMPLE, WHAT OTHER  
12:05PM 8 EXPLANATION THAT MIGHT BE.

12:05PM 9 IT'S UP TO THE DEFENSE TO MAKE THOSE ARGUMENTS IF THEY  
12:05PM 10 WANT TO. IT'S UP TO THE JURY TO WEIGH THEM AND DECIDE HOW MUCH  
12:06PM 11 SIGNIFICANCE TO ASCRIBE TO THE PATIENT TESTIMONY.

12:06PM 12 BUT AGAINST THE BACKDROP OF STRONG EVIDENCE OF REPEATED  
12:06PM 13 AND SYSTEMIC ACCURACY PROBLEMS. INDIVIDUAL EXAMPLES OF  
12:06PM 14 INACCURATE TEST RESULTS ARE SIMPLY, LIKE I SAID, ANOTHER BRICK  
12:06PM 15 IN THE WALL. THEY ABSOLUTELY TEND TO MAKE A FACT IN DISPUTE  
12:06PM 16 MORE LIKELY THAN NOT.

12:06PM 17 THE COURT: ALL RIGHT. THANK YOU. MR. BOSTIC.  
12:06PM 18 MR. WADE.

12:06PM 19 MR. WADE: YOUR HONOR, AGAIN, THEY DON'T MAKE A  
12:06PM 20 MATERIAL FACT MORE PROBABLE BECAUSE THEY HAVEN'T ESTABLISHED  
12:06PM 21 THAT THE THERANOS PRODUCT CAUSED THE RESULT.

12:06PM 22 SO THERE IS NOT -- UNTIL THEY GET THAT TICKET TO  
12:06PM 23 ADMISSION, IT'S NOT AN ASSESSMENT OF WEIGHING THE RELEVANCE AND  
12:06PM 24 WEIGHING IT AGAINST THIS EXTREME PREJUDICE THAT WOULD RESULT  
12:06PM 25 FROM THESE, YOU KNOW, CHERRY PICKED EXAMPLES.

1 IT HAS TO BE ABLE TO BE OFFERED AS RELEVANCE AT THE  
2 OUTSET. THEY'RE JUST SAYING THERE WAS A RESULT AND IT HAPPENED  
3 AT THERANOS, THEREFORE, THAT HAPPENED.

4 THERE ARE MANY OTHER POTENTIAL FACTORS, BUT THEY'RE JUST  
5 PUTTING INTO EVIDENCE THIS WITH THE ASSUMPTION OF CAUSATION AND  
6 THE LABELLING OF A PERSON AS A VICTIM.

7 EVERY ERRONEOUS RESULT THAT RESULTS IN A LAB DOES NOT  
8 RESULT FROM THE TECHNOLOGY OF THE LAB.

9 THE COURT: WELL, MR. BOSTIC INFORMS US, AND HE  
10 ASSURES YOU AND YOUR TEAM, THAT HE HAS ADDITIONAL EVIDENCE TO  
11 PROFFER TO SUPPORT THE CLAIM.

12 MR. WADE: WELL, WE SHOULD BE ABLE TO VOIR DIRE  
13 THOSE WITNESSES OUTSIDE OF THE PRESENCE OF THE JURY BEFORE, IF  
14 THAT'S TRUE, BEFORE THAT IS OFFERED IN FRONT OF THE JURY AND  
15 BEFORE THEY OPEN ON IT.

16 BUT TO SUGGEST THAT THAT EXISTS INDEPENDENTLY -- THEY HAVE  
17 AN EXPERT. THEY HAVE AN EXPERT WHO COULD COME IN AND SAY  
18 THERE'S CAUSATION. THEIR EXPERT HASN'T DONE THAT.

19 THEIR EXPERT HAS SAID THAT YOU NEED TO DO WHAT WE HAVE  
20 SUGGESTED WHICH IS WHERE THE LIS DEFICIENCY COMES IN, WHICH IS  
21 WHEN YOU IDENTIFY AN ANECDOTAL EXAMPLE, YOU NEED TO LOOK AT THE  
22 SURROUNDING FACTS AND CIRCUMSTANCES TO ACCESS WHETHER THERE'S  
23 AN ISSUE WITH THE TECHNOLOGY. THAT'S HOW YOU DO IT  
24 SCIENTIFICALLY.

25 THEY'RE NOT OFFERING IT SCIENTIFICALLY. THEY'RE TRYING TO

12:08PM 1 FIND ANY PATIENT THAT SAYS THAT THEY GOT AN ERRONEOUS RESULT,  
12:08PM 2 IT WAS AT THERANOS, THEREFORE, IT WAS A RESULT OF THERANOS'S  
12:08PM 3 TECHNOLOGY, AND SHIFT THE BURDEN TO MS. HOLMES.

12:08PM 4 IT'S IMPERMISSIBLE, AND IT'S DANGEROUS TESTIMONY IN THE  
12:08PM 5 CONTEXT OF THIS CASE BECAUSE IT WILL BE VERY POWERFUL TO THE  
12:08PM 6 JURY. AND LETTING THAT IN AND SHIFTING TO US THE BURDEN OF  
12:08PM 7 ATTACKING THAT IS UNCONSTITUTIONAL.

12:08PM 8 THE COURT: WELL, WE TALKED ABOUT IT EARLIER. I  
12:08PM 9 SAID YOU HAVE A BATTING AVERAGE OF 1 IN A MILLION. ISN'T THAT  
12:08PM 10 COMPELLING TO A JURY?

12:08PM 11 MR. WADE: THE FACT THAT WE HAVE GOOD ARGUMENTS TO  
12:08PM 12 REFUTE THIS EVIDENCE DOESN'T MEAN THE EVIDENCE SHOULD COME IN  
12:08PM 13 AND WE SHOULD BE PUT TO THAT BURDEN, OKAY? THAT'S WHAT I HAD  
12:08PM 14 TO ADDRESS WITH RESPECT TO THAT.

12:08PM 15 AND I WILL NOTE, ON THE LIS ISSUE, THE GOVERNMENT  
12:09PM 16 CONTINUES TO HAVE THIS INNUENDO WITHOUT EVIDENCE OF OUR  
12:09PM 17 CLIENT'S INVOLVEMENT IN SOME WAY IN THIS, AND IT'S TOTALLY  
12:09PM 18 INAPPROPRIATE AND UNSUPPORTED BY A YEAR LONG GRAND JURY  
12:09PM 19 INVESTIGATION THAT HAS RESULTED IN MILLIONS OF DOCUMENTS BEING  
12:09PM 20 PRODUCED, 20 WITNESSES BEING INTERVIEWED, AND NOT ONE SAYS THAT  
12:09PM 21 MS. HOLMES HAD ANY ROLE IN THE SUBPOENA, COMPLIANCE --

12:09PM 22 THE COURT: YOU'RE TALKING ABOUT A COLLATERAL MATTER  
12:09PM 23 HERE.

12:09PM 24 MR. WADE: I'M TALKING ABOUT THE LIS ISSUE, RIGHT.  
12:09PM 25 YEAH. THEY'VE CREATED THE IMPRESSION THAT BECAUSE THE CLIENT

12:09PM 1 WAS THE CEO DURING THAT TIME PERIOD WHEN THE SUBPOENA WAS  
12:09PM 2 ISSUED, THAT SHE MAY -- THERE'S THIS AURA THAT SHE'S SOMEHOW  
12:09PM 3 INVOLVED.

12:09PM 4 THERE'S NO ACTUAL EVIDENCE THAT THERE IS ANY INVOLVEMENT.  
12:09PM 5 YOU CAN BE SURE THAT THEY WOULD OFFER IT IF THERE WAS. THEY'RE  
12:09PM 6 NOT OFFERING IT, AND, THEREFORE, IT HAS NO ROLE IN THIS CASE.

12:09PM 7 NOW, THEY HAVE EFFECTIVELY CONCEDED THAT THEY'RE  
12:09PM 8 CONTINUING TO TRY TO FIND THAT BECAUSE THEY HAVE AN ONGOING  
12:10PM 9 GRAND JURY, THE GOVERNMENT HAS AN ONGOING GRAND JURY  
12:10PM 10 INVESTIGATION.

12:10PM 11 THEY'RE SAYING, WELL, DON'T RULE ON THAT NOW. LET'S WAIT,  
12:10PM 12 WAIT, WAIT. YOU KNOW, YOUR HONOR, WE'RE -- WE'VE BEEN AT THIS  
12:10PM 13 A LONG TIME. WE'RE GETTING PRETTY CLOSE TO TRIAL AND TO  
12:10PM 14 SUGGEST THAT WE HAVE TO CONTINUE TO WAIT TO SEE IF THEY CAN USE  
12:10PM 15 A GRAND JURY, WHICH THEY SHOULD NOT BE USING TO OBTAIN  
12:10PM 16 EVIDENCE, YOU KNOW, IS TOO MUCH.

12:10PM 17 WE NEED TO SORT OF RULE ON WHAT IS COMING IN AND WHAT IS  
12:10PM 18 NOT COMING IN AND DRAW SOME LINES ON THIS BECAUSE THERE ARE  
12:10PM 19 SERIOUS IMPLICATIONS ON THIS ISSUE.

12:10PM 20 BECAUSE IF THESE ISSUES COME INTO THIS CASE, AS I SAID,  
12:10PM 21 THERE ARE MANY MEMBERS OF THE GOVERNMENT TEAM THAT -- WHO ARE  
12:10PM 22 WITNESSES IN THIS CASE BECAUSE OF THEIR INVOLVEMENT IN THE  
12:10PM 23 FACTS, THERE ARE MEMBERS OF THEIR OFFICES, THERE'S ADDITIONAL  
12:10PM 24 DISCOVERY THAT IS NEEDED.

12:10PM 25 WE DON'T WANT TO BE DISTRACTED BY ANY OF THAT BECAUSE

1 MS. HOLMES HAS NOTHING TO DO WITH THOSE ISSUES. SO WE SHOULD  
2 LEAVE THEM WHERE THEY ARE.

3 BUT IN MAKING THAT ARGUMENT AND IN ADDRESSING THE LIS,  
4 MR. BOSTIC MADE CLEAR, THE PREJUDICE THAT RESULTS TO MS. HOLMES  
5 FROM THE GOVERNMENT'S FAILURE HERE.

6 NOW, FIRST OF ALL, IT WAS NOT -- THE GOVERNMENT IS  
7 PROFFERING SELECTIVE EVIDENCE WITH RESPECT TO THIS. THEY  
8 SAID -- I SAID THE RETURN DATE ON THE GRAND JURY WAS THE 14TH,  
9 NOT THE ISSUANCE. IT WAS ISSUED ON THE 4TH, THE RETURN DATE ON  
10 THE GRAND JURY SUBPOENA FOR THE LIS DATABASE WAS THE 14TH,  
11 WHICH WAS THE DATE THAT THEY INDICTED. SO THEY CLEARLY MADE  
12 THE JUDGMENT. THEY DIDN'T NEED THE EVIDENCE. BUT THEY HAD NO  
13 IDEA WHAT THE EVIDENCE WAS, OKAY?

14 THE GOVERNMENT'S SUGGESTION THAT THE ONLY RELEVANT PERIOD  
15 HERE IS THIS FOUR-DAY PERIOD IS WRONG, THAT EXPERTS WHO HAVE  
16 OFFERED EVIDENCE TO THE GOVERNMENT IN THIS CASE WHO ARE MOST  
17 KNOWLEDGEABLE ABOUT THE LIS DATABASE SAID AT THE END OF AUGUST  
18 THAT THEY BELIEVED THAT THEY COULD RESURRECT THE LIS DATABASE  
19 WITHIN A MONTH. IT WASN'T UNTIL THE HARDWARE WAS DESTRUCTED  
20 BECAUSE OF FAILURE TO GO OUT AND GET IT AND TO TREAT THIS ISSUE  
21 SERIOUSLY THAT THE ABILITY TO RESURRECT THAT WORKING COPY OF  
22 LIS RENDERED IT UNAVAILABLE TO US. THAT'S WHEN THE FAILURE  
23 RESULTED.

24 AND THE GOVERNMENT KNEW THAT THAT COULD HAPPEN. THEY KNEW  
25 THERE WAS DANGER OF LOSING THIS EVIDENCE BECAUSE THE COMPANY

12:12PM 1 HAD GONE TO AN ASSIGNEE YET THEY DIDN'T PURSUE IT.

12:12PM 2 SO ALL OF THAT, AGAIN, SHOULD BE OUT. WE'RE NOT LOOKING  
12:12PM 3 TO PUT PROSECUTORS ON THE WITNESS STAND. WE'RE NOT LOOKING  
12:12PM 4 TO -- WE HAVE ENOUGH WITNESSES TO CALL IN THIS CASE BY ITSELF.  
12:12PM 5 BUT TO THE EXTENT THAT THE GOVERNMENT IS CREATING THIS  
12:12PM 6 IMPRESSION THAT THEIR FAILURE TO ACT WAS SO LIMITED, THE  
12:12PM 7 EVIDENCE IS QUITE TO THE CONTRARY.

12:12PM 8 AND TO BE FAIR TO COUNSEL FOR THE GOVERNMENT, HE  
12:13PM 9 RECOGNIZES THAT THAT IS HOTLY DISPUTED, AND I DON'T WANT TO  
12:13PM 10 CREATE THE IMPRESSION THAT THEIR PROFFERED FACTS ARE ACCURATE  
12:13PM 11 ON THIS RESPECT.

12:13PM 12 FINALLY, WHERE THEY ARE ACCURATE IS WITH RESPECT TO THE  
12:13PM 13 QUALITY OF THAT EVIDENCE, AND TO USE HIS WORDS, THE POWERFUL  
12:13PM 14 TOOL THAT THAT EVIDENCE WOULD PROVIDE WITHIN THIS CASE,  
12:13PM 15 POWERFUL TOOL TO BE ABLE TO PROVIDE DETAILED INFORMATION ABOUT  
12:13PM 16 THE CHERRIES THAT THEY PICKED WITHIN THIS CASE THAT ARE NOT  
12:13PM 17 RELEVANT. THEY'RE TRYING TO CREATE THEIR RELEVANCE BY CALLING  
12:13PM 18 THEM VICTIMS, AND WE HAVE NO ABILITY TO LOOK AT THE WHOLE  
12:13PM 19 ORCHARD. WE HAVE NO ABILITY TO EVEN LOOK AT ALL OF THE  
12:13PM 20 DETAILED FACTS RELATING TO THAT CHERRY BECAUSE IT'S TRUE THAT  
12:13PM 21 THERE IS NO CHECKBOX WITHIN THE DATABASE THAT SAYS, OH,  
12:13PM 22 INACCURATE, ACCURATE. WE NEVER SUGGESTED AS MUCH.

12:13PM 23 BUT WE DID SUGGEST AND THE EVIDENCE SHOWED --

12:14PM 24 THE COURT: IS THAT SIGNIFICANT?

12:14PM 25 MR. WADE: IT'S NOT SIGNIFICANT, YOUR HONOR, BECAUSE

1 THE WAY YOU LOOK AT THESE ISSUES IS THROUGH DETAILED ANALYSIS  
2 OF THE DATA THAT RELATES TO A PARTICULAR PATIENT THAT THEY'RE  
3 OFFERING, A PARTICULAR TEST THAT THEY'RE OFFERING, A PARTICULAR  
4 PHLEBOTOMIST WHO DID THE DRAW ON THAT PATIENT. WERE THERE  
5 ISSUES WITH THAT PHLEBOTOMIST? WAS THAT PHLEBOTOMIST, WHEN SHE  
6 WAS DOING VENOUS DRAWS OR SOMETHING, JUST MAKING ERRORS? IF  
7 SO, THAT DOESN'T GO TO THE CORE OF THERANOS TECHNOLOGY.

8 THAT IS WHERE THE ACTUAL FACTS WITH RESPECT TO WHAT  
9 HAPPENED AND WHETHER THERE'S A CAUSAL RELATIONSHIP BETWEEN THE  
10 THERANOS TECHNOLOGY AND THE PATIENT EXISTS. IT'S WITHIN THAT  
11 POWERFUL TOOL.

12 AND THE DEPRIVATION FROM OF US FROM HAVING THAT TOOL IS  
13 SIGNIFICANT. THE ABILITY OF THE GOVERNMENT TO OFFER THE  
14 EVIDENCE WHEN WE DON'T HAVE IT IS EXTRAORDINARILY PREJUDICIAL  
15 AND ARGUABLY A DUE PROCESS VIOLATION.

16 THE COURT: SO ARE YOU SAYING THAT YOU WOULD LIKE  
17 TO, IF THE COURT WERE TO ALLOW THIS TO GO FORWARD, YOU WOULD  
18 LIKE THE OPPORTUNITY TO TELL, INFORM THE JURY IN SOME MANNER,  
19 BLAME THE GOVERNMENT FOR THE LACK OF EXISTENCE AT THE TRIAL OF  
20 THE LIS?

21 MR. WADE: WE SHOULD BE ABLE TO OFFER TESTIMONY THAT  
22 THERE'S A DATABASE THAT PROVIDES ALL OF THE DETAILED  
23 INFORMATION WITH RESPECT TO TESTING.

24 THE COURT: THERE WAS.

25 MR. WADE: AND THE GOVERNMENT DID NOT -- THERE WAS



12:15PM 1 AT THERANOS'S OPERATING, IT WAS DEVELOPED BY THERANOS'S  
12:15PM 2 EMPLOYEES, VERY COMPLICATED, VERY SOPHISTICATED PIECE OF  
12:15PM 3 TECHNOLOGY DEVELOPED BY THE COMPANY THAT PROVIDED A LOT OF  
12:15PM 4 DETAILED INFORMATION, AND THE GOVERNMENT DID NOT OBTAIN THAT  
12:15PM 5 EVIDENCE.

12:15PM 6 THE COURT: AND IF THAT WERE PERMITTED, YOU WOULD  
12:15PM 7 ASK FOR A JURY INSTRUCTION OF SOME SORT I PRESUME? MAYBE NOT.

12:15PM 8 MR. WADE: YOUR HONOR, AS THE COURT PROBABLY KNOWS  
12:15PM 9 BETTER THAN I DO GIVEN YOUR FREQUENCY OF PRACTICE IN THIS  
12:16PM 10 CIRCUIT, THE NINTH CIRCUIT HAS SEVERAL DIFFERENT TYPES OF  
12:16PM 11 INSTRUCTIONS IN CRIMINAL CASES THAT RELATE TO THE FAILURE TO  
12:16PM 12 OBTAIN EVIDENCE, AND THERE ARE DIFFERENT GRADATIONS. I WILL  
12:16PM 13 DEFER THAT TO THE JURY INSTRUCTION.

12:16PM 14 AS THE COURT WELL KNOWS, THERE IS A NEGLIGENT FAILURE  
12:16PM 15 INSTRUCTION THAT COULD BE PROVIDED. WHETHER THAT'S APPROPRIATE  
12:16PM 16 IN THIS CASE OR NOT, YOU KNOW, WE HAVEN'T DECIDED.

12:16PM 17 THE COURT: AND IF THE COURT WERE TO DECIDE WHETHER  
12:16PM 18 AN INSTRUCTION LIKE THAT SHOULD LIE, MY FOLLOW-UP QUESTION  
12:16PM 19 WOULD BE THEN BECAUSE IT'S A FACTUAL DISPUTE, SHOULDN'T THERE  
12:16PM 20 BE -- I KNOW IN YOUR PLEADINGS I SAW THE TERM MINI TRIALS  
12:16PM 21 ALMOST IN EVERY --

12:16PM 22 MR. WADE: WHEN THERE'S AN 85 PAGE 404(B) NOTICE,  
12:16PM 23 YOUR HONOR, I HOPE YOU UNDERSTAND WHY WE --

12:16PM 24 THE COURT: I CAPTURED IT, YES.

12:16PM 25 BUT IT SEEMS LIKE WHEN THERE'S A FACTUAL DISPUTE, PERHAPS

12:16PM 1 THAT'S A FACTUAL DISPUTE THAT THE JURY WOULD HAVE TO DECIDE,  
12:17PM 2 AND PERHAPS THE COURT WOULD THEN FASHION AN APPROPRIATE  
12:17PM 3 INSTRUCTION IF IT BECOMES AN IMPORTANT ISSUE IN THE CASE FOR  
12:17PM 4 THE JURY TO DECIDE THAT AS WELL, WHETHER OR NOT THE GOVERNMENT  
12:17PM 5 IS AT FAULT, AND WHETHER OR NOT ANYONE IS AT FAULT.

12:17PM 6 AGAIN, THAT'S JUST A HYPOTHETICAL QUESTION.

12:17PM 7 MR. WADE: I THINK IF I'M UNDERSTANDING THE COURT,  
12:17PM 8 THE COURT HAS REFERRED TO DOORS AT DIFFERENT POINTS DOWN THE  
12:17PM 9 HALLWAY, AND IF WE OPEN THE DOOR TO A CERTAIN LINE OF ARGUMENT,  
12:17PM 10 DOES THAT PERMIT THE GOVERNMENT TO COME IN AND SAY, WELL, IT  
12:17PM 11 WASN'T REALLY OUR FAULT, IT WAS THEIR FAULT, WHICH IS KIND OF  
12:17PM 12 WHAT THIS GRAND JURY INVESTIGATION HAS BEEN ABOUT?

12:17PM 13 I THINK THERE'S -- OUR GOAL IS TO NOT TO AVOID THE SIDE  
12:17PM 14 DISTRACTION. IT'S NOT CORE TO THIS CASE.

12:17PM 15 BUT THE GOVERNMENT'S FAILURE TO OBTAIN EVIDENCE IS CORE TO  
12:17PM 16 THIS CASE. THEY DIDN'T HAVE IT AT THE TIME THAT THEY MADE THE  
12:17PM 17 ALLEGATIONS, AND I THINK THE FACT THAT THEY DIDN'T OBTAIN IT  
12:18PM 18 AND CANNOT MEET THEIR BURDEN OF PROOF IS AN ARGUMENT THAT ANY  
12:18PM 19 DEFENDANT SHOULD BE ABLE TO MAKE.

12:18PM 20 IF WE SEEK AN INSTRUCTION THAT THEY'RE AFFIRMATIVELY  
12:18PM 21 BLAMING, YOU SHOULD INFER THAT IT WOULD BE FAVORABLE, THAT MAY  
12:18PM 22 OPEN A CAN OF WORMS THAT I'M GOING TO LEAVE FOR ANOTHER DAY.

12:18PM 23 BUT AT A MINIMUM WE'RE ABLE TO ARGUE ABOUT THEIR FAILURE  
12:18PM 24 TO OBTAIN EVIDENCE THAT THEY NEED TO PROVE THEIR CASE.

12:18PM 25 THE COURT: MR. BOSTIC, DO YOU WANT TO COMMENT ON

12:18PM 1 ANY OF THIS?

12:18PM 2 MR. BOSTIC: VERY BRIEFLY. I WON'T SAY ANYTHING  
12:18PM 3 ELSE ABOUT THE LIS UNLESS THE COURT HAS ANY QUESTIONS, BUT I  
12:18PM 4 WANT TO MAKE TWO IMPORTANT POINTS IN RESPONSE TO WHAT MR. WADE  
12:18PM 5 SAID EARLIER.

12:18PM 6 FIRST, IN RESPONSE TO DEFENSE'S REFERRALS TO DR. MASTER'S  
12:18PM 7 OPINIONS AND ITS RELIANCE, BY THE WAY, ON SEVERAL CASES THAT  
12:18PM 8 ARE IN THE CONTEXT OF THE DAUBERT STANDARD, I JUST THINK IT'S  
12:18PM 9 IMPORTANT TO POINT OUT THAT TESTIMONY BY VICTIMS WHO ARE NOT  
12:18PM 10 EXPERT WITNESSES, TESTIMONY BY VICTIMS IS NOT SUBJECT TO THE  
12:18PM 11 DAUBERT STANDARD. SO DIFFERENCES BETWEEN WHAT THOSE VICTIMS  
12:19PM 12 ARE EXPECTED TO SAY VERSUS WHAT A RETAINED EXPERT IS EXPECTED  
12:19PM 13 TO SAY UNDER THE DAUBERT STANDARD IS NOTHING REMARKABLE,  
12:19PM 14 NOTHING IMPROPER, AND IT IS IMPROPER TO TRY TO IMPOSE THAT  
12:19PM 15 HEIGHTENED DAUBERT STANDARD ON THE TESTIMONY OF NONEXPERTS.

12:19PM 16 THE FINAL POINT IS IN RESPONSE TO MR. WADE'S ARGUMENT THAT  
12:19PM 17 THE GOVERNMENT NEEDS TO MAKE SOME SHOWING ABOUT THE STRENGTH OF  
12:19PM 18 ITS EVIDENCE IN ORDER TO ESTABLISH THE ADMISSIBILITY OF THIS  
12:19PM 19 PATIENT TESTIMONY. THAT APPEARS NOWHERE IN THE LAW. TO ME  
12:19PM 20 THAT SOUNDS LIKE THE DEFENSE IS SAYING THAT THE GOVERNMENT  
12:19PM 21 NEEDS TO PREVAIL ON A RULE 29 MOTION BEFORE IT CAN DEFEAT THIS  
12:19PM 22 MOTION IN LIMINE. THAT'S EXACTLY BACKWARDS.

12:19PM 23 THE DEFENSE'S ENTIRE ARGUMENT HERE IS PREMISED ON ITS  
12:19PM 24 ASSUMPTION, ITS ARGUMENT THAT THE GOVERNMENT CAN'T MEET ITS  
12:19PM 25 BURDEN OF PROOF, BUT THAT CANNOT FORM THE BASIS OF THE COURT'S

12:19PM 1 RULING HERE.

12:19PM 2 THE COURT: ALL RIGHT. THANK YOU.

12:20PM 3 MR. WADE.

12:20PM 4 MR. WADE: NOTHING FURTHER, YOUR HONOR.

12:20PM 5 THE COURT: IS IT TIME FOR LUNCH, FOLKS?

12:20PM 6 MR. WADE: THANK YOU, YOUR HONOR.

12:20PM 7 THE COURT: I THINK IT IS. LET'S TAKE OUR NOON

12:20PM 8 RECESS NOW, PLEASE.

12:20PM 9 WHY DON'T WE SEE EVERYBODY BACK AT, LET'S SEE, 1:30, 1:30.

12:20PM 10 MS. SAHARIA: THANK YOU, YOUR HONOR.

12:20PM 11 THE COURT: ALL RIGHT. THANK YOU.

12:20PM 12 (LUNCH RECESS TAKEN AT 12:20 P.M.)

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**AFTERNOON SESSION**

(COURT CONVENED AT 1:35 P.M.)

THE COURT: WE'RE BACK ON THE RECORD. ALL PARTIES PREVIOUSLY PRESENT ARE PRESENT ONCE AGAIN.

AND WE'LL TAKE UP THE REMAINING MOTIONS.

I THINK THE NEXT MOTION IS DOCKET 561, I BELIEVE. THIS IS MS. HOLMES'S MOTION TO EXCLUDE EVIDENCE OF FACT PERCIPIENT WITNESSES.

MS. TREFZ: GOOD AFTERNOON, YOUR HONOR.

KATIE TREFZ FOR MS. HOLMES.

THE COURT: THANK YOU. GOOD AFTERNOON. NICE TO SEE YOU.

MS. TREFZ: NICE TO SEE YOU AS WELL.

THE COURT: THANK YOU.

MS. TREFZ: THIS MOTION, AS YOU NOTED, RELATES TO THE TESTIMONY OF CERTAIN FACT WITNESS DOCTORS FROM WHOM THE GOVERNMENT ALSO SEEKS TO ELICIT EXPERT TESTIMONY. AND JUST BY WAY OF ROADMAPING, THIS IS ONE OF THOSE MOTIONS THAT I THINK WOULD BENEFIT FROM SOME FAIRLY DETAILED DISCUSSION BECAUSE IT'S VERY KIND OF -- IT PRESENTS SOME SORT OF THORNY FACTUAL AND LEGAL QUESTIONS THAT ARE RELATED TO A LOT OF THE ISSUES THAT YOU'VE BEEN DISCUSSING WITH MR. WADE AND MR. BOSTIC EARLIER TODAY.

SO I'M -- MY PLAN WAS TO DO A LITTLE OVERVIEW OF THE MOTION, AND THEN I'D LIKE TO TALK BRIEFLY ABOUT THE

GOVERNMENT'S REPRESENTATIONS KIND OF NARROWING THE SCOPE OF THE TESTIMONY, WHICH I THINK REALLY HELPS PUT INTO FOCUS WHAT THE REMAINING ISSUES ACTUALLY ARE WITH RESPECT TO OUR MOTION.

THIRD, THEN I'D LIKE TO WALK THROUGH WHAT I THINK ARE ESSENTIALLY FOUR TYPES OF OPINIONS THAT WE ARE -- THAT ARE STILL IN CONTENTION HERE THAT WE'RE MOVING TO EXCLUDE AND FOR ADDITIONAL -- FOR TWO REASONS: ONE ON 702 GROUNDS AND THEN, TWO, ON RULE 16 GROUNDS.

THE COURT: CAN I ASK -- THANK YOU. MAY I ASK A THRESHOLD QUESTION?

MS. TREFZ: YES.

THE COURT: IS ONE OF THE ISSUES HERE A QUESTION FOR THE GOVERNMENT AS TO WHETHER OR NOT ADDITIONAL SUBPOENAS WILL BE ISSUED OR A QUESTION FOR THE GOVERNMENT ABOUT WHAT ADDITIONAL INFORMATION THEY MIGHT BE COLLECTING? WOULD THAT HELP THE DISCUSSION HERE?

MS. TREFZ: I THINK IT WILL, ALTHOUGH I WOULD SAY THAT DEPENDING ON WHAT IS BEING COLLECTED AND WHEN, WE STILL THINK THAT THE GOVERNMENT WILL NEED TO PROVIDE OR HAS -- AND HAS FAILED TO PROVIDE AN ADEQUATE RULE 16 SUMMARY OF THOSE DISCLOSURES. YOU KNOW, IT DOES SEEM LIKE THE GOVERNMENT IS, AT LEAST BASED ON DISCOVERY WE'VE RECEIVED, CONTINUING TO GATHER INFORMATION FROM THESE DOCTORS.

WE TAKE ISSUE WITH THAT A LITTLE BIT, WHICH MY HOPE WAS TO GET TO THAT A LITTLE BIT LATER ONCE WE'RE KIND OF THERE, BUT OF

01:38PM 1 COURSE IT WOULD BE HELPFUL TO KNOW WHAT THE GOVERNMENT IS  
01:38PM 2 CONTINUING TO DO.

01:38PM 3 WE HAVE NOT HAD A DISCUSSION WITH THEM ABOUT THE RULE 17  
01:38PM 4 SUBPOENAS THAT THEY SAY THAT THEY'RE ISSUING, ALTHOUGH I DO  
01:38PM 5 KNOW FROM THE DISCOVERY THAT WE RECEIVED THAT THEY CERTAINLY  
01:38PM 6 HAVE BEEN, AT LEAST WITH RESPECT TO ONE OF THE DOCTORS, THEY  
01:38PM 7 HAVE FBI AGENTS KIND OF LOOKING AT ALL OF THOSE DOCTOR'S FILES  
01:38PM 8 AND ARE PRODUCING ADDITIONAL THINGS.

01:38PM 9 THE COURT: I LOOKED AT THIS AND I THOUGHT THAT IT  
01:39PM 10 MIGHT BE HELPFUL TO HAVE THAT QUESTION POSED AND ANSWERED AND  
01:39PM 11 THAT MIGHT BE BENEFICIAL TO THE MOTION. I DON'T MEAN TO  
01:39PM 12 PRECLUDE YOU FROM SPEAKING TO THE MOTION, BUT IT SEEMS LIKE  
01:39PM 13 THERE ARE SOME QUESTIONS THAT MIGHT BENEFIT FROM THE ANSWER AND  
01:39PM 14 THAT MIGHT BE HELPFUL TO YOU AND YOUR TEAM.

01:39PM 15 MS. TREFZ: WE'RE HAPPY TO KNOW THE ANSWERS. I  
01:39PM 16 DON'T THINK THAT THEY ARE -- THAT THEY KIND OF SUPPLANT THE  
01:39PM 17 MOTION, SO WE STILL HAVE SOME THOUGHTS TO PROVIDE. BUT, OF  
01:39PM 18 COURSE, WE'RE HAPPY TO HEAR WHAT THE GOVERNMENT IS DOING.

01:39PM 19 THE COURT: WELL, IS THE GOVERNMENT PREPARED TO  
01:39PM 20 SPEAK TO THAT NOW, OR WOULD YOU LIKE TO WAIT UNTIL THIS  
01:39PM 21 DISCUSSION FROM THE DEFENSE IS FINISHED?

01:39PM 22 MR. BOSTIC.

01:39PM 23 MR. BOSTIC: JOHN BOSTIC FOR THE UNITED STATES, YES.

01:39PM 24 I'M HAPPY TO ADDRESS THAT NOW IF THE COURT WOULD LIKE TO  
01:39PM 25 KNOW, AND I'M PREPARED TO PROVIDE THAT INFORMATION.

01:39PM 1 THE COURT: THANK YOU. WHY DON'T YOU TELL US THAT?  
01:39PM 2 THAT MIGHT BE HELPFUL.

01:39PM 3 MR. BOSTIC: LIKE MS. TREFZ, I THINK I SEE THE  
01:39PM 4 ISSUES IN THIS MOTION AS SEPARATED INTO THE UNDERLYING QUESTION  
01:40PM 5 OF WHETHER THIS KIND OF TESTIMONY CAN BE ADMITTED, AND THEN THE  
01:40PM 6 SEPARATE QUESTION OF, WHAT LEVEL OF DISCLOSURE IS NECESSARY BY  
01:40PM 7 THE GOVERNMENT IN ORDER TO AVOID PREJUDICE TO THE DEFENSE  
01:40PM 8 ESSENTIALLY?

01:40PM 9 SO I'LL TAKE THAT SECOND POINT.

01:40PM 10 HERE THE GOVERNMENT'S EXPERT DISCLOSURES, WHEN THEY WERE  
01:40PM 11 SERVED, REFLECTED THE TOTALITY OF THE GOVERNMENT'S INFORMATION  
01:40PM 12 ABOUT THE EXPERT'S ANTICIPATED OPINIONS AND THE BASES FOR THOSE  
01:40PM 13 OPINIONS.

01:40PM 14 IN THE TIME SINCE THEN, AS MS. TREFZ NOTED, WE HAVE  
01:40PM 15 CONTINUED OUR EFFORTS TO GATHER ADDITIONAL FACTS AND EVIDENCE  
01:40PM 16 FROM THOSE DOCTORS TO PROVIDE FURTHER SUPPORT OF THEIR --  
01:40PM 17 FURTHER SUPPORT FOR THEIR OPINIONS, PARTLY IN RESPONSE TO  
01:40PM 18 QUESTIONS AND THE POINTS RAISED BY THE DEFENSE IN THEIR  
01:40PM 19 BRIEFING.

01:40PM 20 THAT EFFORT HAS MET WITH SOME CHALLENGES. I THINK AS  
01:40PM 21 ALLUDED TO IN THE GOVERNMENT'S BRIEFING, AND I'LL JUST UPDATE  
01:41PM 22 THE COURT SINCE THEN, IT'S BEEN THE SAME, BUT SOME OF OUR  
01:41PM 23 DOCTOR WITNESSES HAVE BEEN VERY DIFFICULT TO CONTACT OVER THE  
01:41PM 24 LAST SEVERAL MONTHS. I THINK MORE THAN ONE OF THEM IS QUITE  
01:41PM 25 IMPACTED BY THE ONGOING COVID-19 PANDEMIC. IN PARTICULAR, ONE



01:41PM 1 DOCTOR, WHO FOCUSES ON POLYCYSTIC OVARIAN SYNDROME, HAS  
01:41PM 2 BRANCHED OUT INTO COVID-19 TESTING AND ALSO VACCINATION AND IS  
01:41PM 3 NOW OVERSEEING WHAT I UNDERSTAND TO BE A MULTI-STATE TESTING  
01:41PM 4 AND VACCINATION OPERATION INVOLVING THOUSANDS OF EMPLOYEES.

01:41PM 5 SO IT'S BEEN CHALLENGING, TO SAY THE LEAST, TO GET THESE,  
01:41PM 6 OR SOME OF THE DOCTORS, TO BUILD SOME TIME INTO THEIR SCHEDULES  
01:41PM 7 TO TRY TO GO BACK AND FIND THE FILES FOR THE INDIVIDUAL  
01:41PM 8 PATIENTS THAT THEIR OPINIONS ARE BASED ON AND GET THOSE TO THE  
01:41PM 9 GOVERNMENT.

01:41PM 10 TO THE EXTENT THAT WE HAVE RECEIVED ADDITIONAL INFORMATION  
01:41PM 11 FROM THOSE DOCTORS, AND WE HAVE, INCLUDING FROM THAT PARTICULAR  
01:41PM 12 DOCTOR WHO SENT US A CHART OF ALL OF THE RELEVANT TESTOSTERONE  
01:42PM 13 RESULTS BOTH FROM THERANOS AND FROM OTHER LABS FOR THE PATIENTS  
01:42PM 14 THAT WOULD INCLUDE, I THINK THE SMALLER GROUP OF PATIENTS THAT  
01:42PM 15 SHE WOULD CONTEND GOT INACCURATE THERANOS TEST RESULTS, WE  
01:42PM 16 RECEIVED THAT CHART AND OF COURSE PRODUCED IT TO THE DEFENSE.

01:42PM 17 ANOTHER -- ONE OF OUR PROPOSED DOCTOR WITNESSES IS AN  
01:42PM 18 OBSTETRICIAN WHOM WE HAVE BEEN IN RECENT CONTACT WITH AND WHO  
01:42PM 19 WAS ABLE TO POINT US TO SPECIFIC PATIENTS THAT ARE THE BASIS  
01:42PM 20 FOR HIS OPINION, AND WE, OF COURSE, PROVIDED THE MEMORANDA OF  
01:42PM 21 THOSE INTERVIEWS TO THE DEFENSE, ALONG WITH THE ATTACHED  
01:42PM 22 DOCUMENTS IN THE PATIENT FILES.

01:42PM 23 SO WE ARE MAKING PROGRESS, FRANKLY, NOT AS QUICKLY AS I  
01:42PM 24 WOULD LIKE US TO MAKE.

01:42PM 25 IT IS OUR PLAN TO CONTINUE THOSE EFFORTS, AND ALSO TO

01:42PM 1 PROVIDE UPDATED DISCLOSURES TO THE DEFENSE LISTING THE NEW  
01:42PM 2 DETAILS THAT WE HAVE OBTAINED FROM THOSE DOCTORS.

01:43PM 3 I BELIEVE THE POTENTIAL PREJUDICE TO THEM IS MITIGATED  
01:43PM 4 PARTLY BY THE FACT THAT WE'VE BEEN KEEPING THEM APPRISED OF OUR  
01:43PM 5 ONGOING EFFORTS THROUGH ROLLING DISCOVERY PRODUCTION.

01:43PM 6 AND AGAIN, I WOULD JUST POINT OUT THAT BECAUSE WE'RE STILL  
01:43PM 7 APPROXIMATELY FOUR MONTHS FROM TRIAL, OR MAYBE LONGER, BEFORE  
01:43PM 8 THESE WITNESSES TESTIFY OR BEFORE THE PRETRIAL CONFERENCE,  
01:43PM 9 THERE IS STILL TIME TO AMEND THAT DISCLOSURE I WOULD SUGGEST  
01:43PM 10 AND STILL GIVE THE DEFENSE AMPLE TIME TO PREPARE THEIR RESPONSE  
01:43PM 11 TO THESE FAIRLY NARROW AND SIMPLE THINGS.

01:43PM 12 THE COURT: ALL RIGHT. THANK YOU.

01:43PM 13 DO YOU WANT TO SPEAK TO RULE 17 AT ALL, OR IS THAT  
01:43PM 14 APPROPRIATE FOR YOU TO TALK ABOUT NOW AT ALL?

01:43PM 15 MR. BOSTIC: I AM HAPPY TO.

01:43PM 16 THAT IS STILL SOMETHING THAT THE GOVERNMENT IS  
01:43PM 17 CONSIDERING, AND WE WILL USE EITHER RULE 17 OR TRIAL SUBPOENAS  
01:43PM 18 AS NECESSARY.

01:43PM 19 BUT IN THE MEANTIME, WHAT WE REALLY NEED IS THE DOCTORS TO  
01:43PM 20 IDENTIFY INDIVIDUAL PATIENTS FOR US, AND IT'S DIFFICULT TO  
01:43PM 21 CRAFT A SUBPOENA TO CAPTURE THAT WHEN REALLY WHAT WE NEED IS  
01:44PM 22 FOR THEM TO PUT IN THE WORK AND IDENTIFY THE UNDERLYING BASES  
01:44PM 23 FOR THEIR OPINIONS AND WHAT THOSE OPINIONS ARE.

01:44PM 24 THIS IS FURTHER COMPOUNDED BY THE FACT THAT OF COURSE, AS  
01:44PM 25 THE COURT KNOWS, THESE ARE NOT RETAINED EXPERTS, SO THESE

01:44PM 1 EXPERT DISCLOSURE REQUIREMENTS ARE MOST OFTEN APPLIED AND  
01:44PM 2 ENFORCED IN THE CONTEXT OF EXPERTS WHO ARE HIRED AND PAID  
01:44PM 3 SIGNIFICANT SUMS OF MONEY TO BE AT THE BECK AND CALL OF THE  
01:44PM 4 LITIGATING PARTIES, AND THAT'S NOT THE CASE HERE.

01:44PM 5 THESE INDIVIDUALS ARE PRIMARILY PERCIPIENT WITNESSES WHO  
01:44PM 6 ARE GOING TO TESTIFY ABOUT THEIR EXPERIENCES TREATING PATIENTS  
01:44PM 7 WHO GOT INACCURATE THERANOS TEST RESULTS. THERE IS AN OPINION  
01:44PM 8 COMPONENT OF THEIR TESTIMONY, BUT THEY'RE NOT TYPICAL EXPERTS  
01:44PM 9 IN MANY WAYS.

01:44PM 10 THE COURT: SURE. THANK YOU.

01:44PM 11 WOULD IT ASSIST YOU AND YOUR TEAM IN SECURING THIS  
01:44PM 12 INFORMATION IF THE COURT WERE TO PLACE, I DON'T KNOW, DEADLINES  
01:44PM 13 OR SOMETHING LIKE THAT SUCH THAT YOU COULD EXPRESS THAT TO THE  
01:44PM 14 GOOD DOCTORS, THAT THE COURT IS HOLDING YOUR FEET TO THE FIRE,  
01:45PM 15 OR SOMETHING LIKE THAT, TO GET THEM TO WORK A LITTLE MORE  
01:45PM 16 DILIGENTLY? WOULD THAT BE OF SOME ASSISTANCE?

01:45PM 17 MR. BOSTIC: IT'S HARD TO SAY, YOUR HONOR. I  
01:45PM 18 BELIEVE THE EXPERTS ARE USING THEIR BEST EFFORTS TO TRY TO  
01:45PM 19 JUGGLE THEIR VARIOUS RESPONSIBILITIES AND BE RESPONSIVE TO US.

01:45PM 20 IF THE COURT THINKS THAT'S NECESSARY, OF COURSE THE  
01:45PM 21 GOVERNMENT WILL USE ITS BEST EFFORTS TO COMPLY WITH THAT  
01:45PM 22 DEADLINE AND ENSURE THAT THE WITNESSES COMPLY.

01:45PM 23 THE COURT: I'M JUST ASKING IN THE ABSTRACT,  
01:45PM 24 SOMETIMES THAT'S HELPFUL IF YOU CONTACT SOMEBODY AND TELL THEM,  
01:45PM 25 THE COURT EXPECTS A RESPONSE BY X DATE, AND I'M SURE YOU AND

01:45PM 1 YOUR TEAM CAN PHRASE THAT IN AN APPROPRIATE WAY WHAT THAT  
01:45PM 2 MEANS. I JUST DON'T KNOW. I WANTED TO OFFER THAT AS A  
01:45PM 3 SUGGESTION IF THAT MIGHT BE HELPFUL.

01:45PM 4 MR. BOSTIC: I APPRECIATE THAT, YOUR HONOR. I  
01:45PM 5 WOULDN'T REQUEST IT ON BEHALF OF THE GOVERNMENT, BUT, OF  
01:45PM 6 COURSE, THE GOVERNMENT WILL ABIDE BY ANY COURT ORDER.

01:45PM 7 THE COURT: THANK YOU.

01:45PM 8 DO YOU HAVE ANYTHING LEFT TO SAY, MS. TREFZ?

01:46PM 9 MS. TREFZ: I DO, UNFORTUNATELY, YOUR HONOR. I'M  
01:46PM 10 SORRY FOR ALL OF YOUR TIME, BUT WE DO HAVE IMPORTANT ISSUES TO  
01:46PM 11 DEAL WITH I THINK.

01:46PM 12 AS IS CLEAR FROM THIS DISCUSSION AND FROM OUR MOTIONS, THE  
01:46PM 13 GOVERNMENT HAS INDICATED THAT IT INTENDS TO CALL SEVERAL  
01:46PM 14 DOCTORS WHOSE PATIENTS WERE THERANOS CUSTOMERS, AND BASED ON  
01:46PM 15 THOSE DISCLOSURES AND OTHER DISCOVERY, IT APPEARS THAT A KEY  
01:46PM 16 PIECE OF THE ANTICIPATED TESTIMONY FOR THOSE DOCTORS IS THAT  
01:46PM 17 THEY'RE GOING TO -- IS THAT THE GOVERNMENT WILL SEEK TO ELICIT  
01:46PM 18 THAT THE PATIENTS OF THEIRS RECEIVED INCORRECT OR LIKELY  
01:46PM 19 INCORRECT RESULTS FROM THERANOS.

01:46PM 20 AND THIS IS -- THE KIND OF PLAIN GOAL OF THIS EVIDENCE IS  
01:46PM 21 TO PROVE THE GOVERNMENT'S ALLEGATIONS ABOUT THE CAPABILITIES OF  
01:46PM 22 THERANOS TECHNOLOGY.

01:46PM 23 AND JUST TO TOUCH BRIEFLY ON A DISCUSSION THAT OCCURRED  
01:46PM 24 EARLIER, I THINK, YOU KNOW, MR. BOSTIC WAS FOCUSSED ON INTENT  
01:46PM 25 AS A QUESTION, BUT THERE IS ALSO THE SEPARATE ISSUE OF WHETHER

01:46PM 1 THE ALLEGED MISREPRESENTATIONS WERE, IN FACT, FALSE.

01:47PM 2 AND THE ALLEGATION ABOUT THE MISREPRESENTATIONS IS THAT  
01:47PM 3 THEY WERE MISREPRESENTATIONS ABOUT THE CAPABILITIES OF  
01:47PM 4 THERANOS'S TECHNOLOGY. SO THE GOVERNMENT NEEDS TO PROVE THAT  
01:47PM 5 THE, THAT THE -- IT'S NOT SIMPLY A MATTER OF WHAT MS. HOLMES'S  
01:47PM 6 INTENT WAS. IT IS ALSO A MATTER OF WHETHER THOSE WERE, IN  
01:47PM 7 FACT, MISREPRESENTATIONS.

01:47PM 8 SO THIS IDEA THAT THE GOVERNMENT NEEDS ALL OF THESE  
01:47PM 9 DIFFERENT WAYS TO PROVE THAT THERANOS'S TECHNOLOGY, THE  
01:47PM 10 CAPABILITIES OF THERANOS'S TECHNOLOGY WAS THAT IT DID NOT  
01:47PM 11 CONSISTENTLY PROVIDE ACCURATE AND RELIABLE RESULTS, THAT'S A  
01:47PM 12 KEY ELEMENT OF THEIR CASE THAT IS SEPARATE FROM THE INTENT  
01:47PM 13 ELEMENT.

01:47PM 14 SO THESE DOCTORS ARE BEING USED AS ONE WAY TO KIND OF FILL  
01:47PM 15 IN THE EVIDENCE, PLUG THAT HOLE THAT MR. WADE AND MS. SAHARIA  
01:47PM 16 WERE TALKING ABOUT.

01:47PM 17 BECAUSE SOME OF THE TESTIMONY FALLS INTO THE REALM OF  
01:47PM 18 EXPERT TESTIMONY, THE GOVERNMENT RIGHTLY INCLUDED CERTAIN OF  
01:48PM 19 THE DOCTOR WITNESSES, AND THIS IS SOME OF ITS DOCTOR WITNESSES  
01:48PM 20 ON ITS WITNESS LIST, NOT ALL OF THEM.

01:48PM 21 IT INCLUDED THEM IN ITS EXPERT DISCLOSURES, AND THE MOST  
01:48PM 22 RECENT DISCLOSURE IS FROM SEPTEMBER 2020, AND THAT IDENTIFIED  
01:48PM 23 NINE MEDICAL PROFESSIONALS THAT MAY PROVIDE EXPERT TESTIMONY.

01:48PM 24 AND THE EXACT TESTIMONY VARIES BY DOCTOR, SO THAT'S WHY  
01:48PM 25 IT'S KIND OF WORTH GOING THROUGH THESE DIFFERENT CATEGORIES

01:48PM 1 THAT I WANTED TO OUTLINE FOR THE COURT IN A FEW MINUTES.

01:48PM 2 THE OPPOSITION -- THE GOVERNMENT'S OPPOSITION REPRESENTS  
01:48PM 3 THAT IT WILL ELICIT ACTUALLY A NARROWER SET OF TESTIMONY THAT I  
01:48PM 4 THINK IS DISCLOSED IN THE RULE 16 DISCLOSURES, BUT THE  
01:48PM 5 TESTIMONY THAT THE GOVERNMENT HASN'T DISCLAIMED STILL PUTS  
01:48PM 6 THESE WITNESSES IN THAT TRICKY CATEGORY OF BEING BOTH FACT  
01:48PM 7 WITNESSES AND EXPERT WITNESSES AS MR. BOSTIC SUGGESTED.

01:48PM 8 AND WHAT THAT MEANS IS THAT WHILE THEY MAY HAVE SOME  
01:49PM 9 TESTIMONY THAT IS BASED ON THEIR PERCIPIENT OBSERVATION,  
01:49PM 10 WHETHER THEY END UP APPLYING THEIR MEDICAL EXPERTISE OR DRAW  
01:49PM 11 CONCLUSIONS OR OPINIONS ABOUT, FOR EXAMPLE, THERANOS TEST  
01:49PM 12 RESULTS, THE TESTIMONY THAT THEY GIVE IS FULLY SUBJECT TO BOTH  
01:49PM 13 RULE 16'S (A) (1) (G) DISCLOSURE REQUIREMENTS AND 702 AND DAUBERT  
01:49PM 14 AND THE COURT'S GATEKEEPING FUNCTION IS FULLY ENGAGED.

01:49PM 15 SO WITH RESPECT TO SOME OF THE OPINIONS, NOT ALL OF THEM  
01:49PM 16 THAT ARE IN THE DISCLOSURES, BUT WITH RESPECT TO SOME OF THE  
01:49PM 17 OPINIONS THAT ARE IN THE DISCLOSURES, WE THINK THAT THEY HAVE  
01:49PM 18 NOT PROVIDED AN ADEQUATE BASIS UNDER RULE 16 AND THAT, AS A  
01:49PM 19 RESULT, THE COURT IS IN A POSITION WHERE IT CAN'T ACTUALLY  
01:49PM 20 PERFORM ITS GATEKEEPING FUNCTION CERTAINLY WITHOUT A DAUBERT  
01:49PM 21 HEARING OR FURTHER -- OR VOIR DIRE BEFORE THOSE WITNESSES  
01:49PM 22 TESTIFY.

01:49PM 23 I AM GOING TO FOCUS ON THESE FOUR OPINIONS THAT I KEEP  
01:50PM 24 MENTIONING, BUT JUST BEFORE I GET THERE, I WANTED TO, TO TALK  
01:50PM 25 ABOUT THE REPRESENTATIONS THAT SEEM TO NARROW THE CATEGORY --

01:50PM 1 WHAT THE GOVERNMENT WILL OFFER THESE WITNESSES TO SAY. AND IN  
01:50PM 2 PARTICULAR, WE'D ASK THAT THE GOVERNMENT BE HELD TO THESE  
01:50PM 3 REPRESENTATIONS AND THAT THEY BE INCORPORATED INTO AN ORDER  
01:50PM 4 JUST FOR CLARITY AND EASIER ENFORCEMENT LATER ON.

01:50PM 5 AND THOSE REPRESENTATIONS WE OUTLINED ON PAGE 2 OF OUR  
01:50PM 6 REPLY, BUT JUST BRIEFLY, NUMBER ONE, THAT THE DOCTOR WITNESSES  
01:50PM 7 WILL NOT TESTIFY ABOUT THE OVERALL ACCURACY OF THERANOS  
01:50PM 8 RESULTS; NUMBER TWO, THAT THE DOCTOR WITNESSES WILL NOT TESTIFY  
01:50PM 9 AS TO THE EXPLANATION FOR THE INCORRECT RESULTS; AND, NUMBER  
01:50PM 10 THREE, THAT THE DOCTOR WITNESSES' TESTIMONY WILL BE LIMITED TO  
01:50PM 11 THE SPECIFIC RESULTS THAT THEIR PATIENTS RECEIVED FROM  
01:50PM 12 THERANOS.

01:50PM 13 AND TO BE CLEAR, WE DON'T -- WE STILL OBJECT TO THE  
01:50PM 14 ADMISSION OF TESTIMONY ABOUT THESE PARTICULAR PATIENTS'  
01:51PM 15 RESULTS, BUT IN THE EVENT THE COURT, YOU KNOW, DOES NOT FIND  
01:51PM 16 OUR OBJECTION WELL TAKEN OR OVERRULES OUR MOTION OR DENIES OUR  
01:51PM 17 MOTION WITH RESPECT TO ANECDOTAL TESTIMONY, WE STILL ASK THAT  
01:51PM 18 THE GOVERNMENT BE HELD TO ITS OWN REPRESENTATION ABOUT THESE  
01:51PM 19 LIMITS.

01:51PM 20 THE COURT: MAY I STOP YOU THERE --

01:51PM 21 MS. TREFZ: YES.

01:51PM 22 THE COURT: -- AND TURN TO MR. BOSTIC. I'M SORRY TO  
01:51PM 23 DO THIS POINT, COUNTERPOINT, BUT SOMETIMES IT'S HELPFUL.

01:51PM 24 MS. TREFZ: SURE.

01:51PM 25 THE COURT: BUT, MR. BOSTIC, AS TO THOSE

1 LIMITATIONS, THAT IS, THAT PRECLUDING THE WITNESSES FROM  
2 TESTIFYING ABOUT LAB ERROR THAT CAUSED THE INACCURACY OR  
3 TESTIFYING ABOUT ANY OTHER SPECIFICS, DO YOU QUARREL WITH THAT?

4 MR. BOSTIC: SO, YOUR HONOR, THE GOVERNMENT STANDS  
5 BY THE REPRESENTATIONS IN ITS BRIEFING.

6 I WOULD JUST SAY AS TO THE CHARACTERIZATION OF THAT  
7 NARROWING IN THE DEFENSE'S REPLY BRIEF, I'M NOT SURE I WOULD  
8 PUT IT EXACTLY THE WAY THEY PUT IT.

9 FOR EXAMPLE, I NOTE THAT THE DEFENSE CLAIMS THAT, FOR  
10 EXAMPLE, EVERY TIME A DOCTOR SAYS SOMETHING LIKE LAB ERROR IS  
11 THE ONLY EXPLANATION FOR THE NUMBERS HE SAW FROM THERANOS, OR  
12 THAT LAB ERROR/INACCURATE TESTING IS THE ONLY POSSIBILITY, THE  
13 DEFENSE SOMEWHAT AGGRESSIVELY READS THE GOVERNMENT'S NARROWING  
14 OF EXPERT OPINIONS AS EXCLUDING THOSE STATEMENTS, AND I DON'T  
15 SEE IT THAT WAY.

16 I BELIEVE THAT IF A DOCTOR IS QUALIFIED TO TESTIFY THAT A  
17 SPECIFIC THERANOS TEST RESULT COULD NOT HAVE BEEN ACCURATE,  
18 THEN IT'S THE SAME THING TO SAY THAT THE TEST WAS INACCURATE OR  
19 THAT LAB ERROR/INACCURATE TESTING IS THE ONLY EXPLANATION.

20 IN MY VIEW THESE ARE SYNONYMOUS STATEMENTS, SO I'M NOT  
21 SURE WHETHER THE DEFENSE IS SUGGESTING DIFFERENT LANGUAGE BE  
22 USED, BUT I THINK THE DEFENSE'S READING OF THE GOVERNMENT'S  
23 SO-CALLED "CONCESSIONS" ARE A LITTLE BROAD.

24 THE COURT: I SEE. THANK YOU.

25 WHEN I READ THOSE I THOUGHT, WELL, IT'S APPROPRIATE TO



01:53PM 1 ALLOW THE PHYSICIANS TO TESTIFY ABOUT THE TESTS, THE INACCURACY  
01:53PM 2 OF THE TESTS, AND I THINK GOT DOWN TO A LITTLE BIT MORE  
01:53PM 3 GRANULAR ABOUT RECEIVING A TEST RESULT AND RECOGNIZING THAT IT  
01:53PM 4 WAS NOT POSSIBLE THAT THE NUMBERS, THE GRADATIONS, WHATEVER IT  
01:53PM 5 WAS, IT WAS JUST SO OFF THE CHARTS FROM NORMAL MEDICAL  
01:53PM 6 BIOLOGICAL PRACTICE THAT THEY ORDERED RETESTS AND ANOTHER TEST  
01:53PM 7 CAME IN, WITHOUT SAYING THIS IS EVIDENCE THEN THAT THERANOS  
01:53PM 8 CANNOT ACCURATELY AND CONSISTENTLY PROVIDE TESTING, BUT I HAD  
01:53PM 9 THIS TEST RESULT FROM MY PATIENT, IT WAS WRONG, THE TEST WAS  
01:53PM 10 FROM THERANOS, AND THAT'S ALL I CAN SAY ABOUT IT.

01:54PM 11 MS. TREFZ: WELL, WITH RESPECT TO THE SPECIFIC POINT  
01:54PM 12 THAT MR. BOSTIC MADE ON LAB ERROR IS THE ONLY EXPLANATION, I'M  
01:54PM 13 NOT SURE THAT THESE WITNESSES HAVE THE BASIS TO GO THERE.

01:54PM 14 I THINK WHAT YOUR HONOR SAID WAS SOMETHING SLIGHTLY  
01:54PM 15 DIFFERENT, WHICH IS THE CONCLUSION THAT THE TESTS WERE  
01:54PM 16 INACCURATE OR THAT A SPECIFIC TEST WAS INACCURATE AND IT CAME  
01:54PM 17 FROM THERANOS, NOT NECESSARILY ASCRIBING IT TO, YOU KNOW, LAB  
01:54PM 18 ERROR OR JUST REGULAR IMPRECISION OR SOME OTHER PATIENT  
01:54PM 19 MEDICATION OR SOMETHING LIKE THAT.

01:54PM 20 I THINK THAT THOSE ARE TWO DIFFERENT THINGS.

01:54PM 21 WITH RESPECT TO THE INDIVIDUAL PATIENT RESULTS, I THINK WE  
01:54PM 22 HAVE OUR OBJECTION ON THE -- THAT YOU JUST WERE DISCUSSING WITH  
01:54PM 23 RESPECT TO THE FACT THAT THESE ARE ANECDOTES AND WE THINK THAT  
01:54PM 24 THEY ARE NOT PROBATIVE BUT ARE EXTREMELY PREJUDICIAL IN THE  
01:54PM 25 CONTEXT OF THIS SCIENTIFIC CASE.

01:55PM 1 BUT ASIDE FROM KIND OF THAT -- WITH THOSE QUALIFICATIONS,  
01:55PM 2 I GUESS I WOULD SAY THAT, FOR US, HOW WE READ THE GOVERNMENT'S  
01:55PM 3 REPRESENTATION WAS THAT SOMETHING LIKE LAB ERROR IS THE ONLY  
01:55PM 4 POSSIBILITY BECAUSE IT ASCRIBES A SPECIFIC REASON TO THE  
01:55PM 5 INACCURACY AND IS NOT JUST THE RESULT IS INACCURATE BASED ON  
01:55PM 6 WHAT I KNOW OF THIS PATIENT'S MEDICAL HISTORY AND MEDICAL FILE.

01:55PM 7 WE THOUGHT THAT THAT WAS APPROPRIATELY LIMITED BY THE  
01:55PM 8 GOVERNMENT.

01:55PM 9 THE COURT: MR. BOSTIC.

01:55PM 10 MR. BOSTIC: AND, YOUR HONOR, I THINK MY ANSWER  
01:55PM 11 WOULD BE THAT WHEN WE'RE SPEAKING TO THESE DOCTOR WITNESSES AND  
01:55PM 12 THEY USE THE PHRASE "LAB ERROR" WHEN THEY SAY LAB ERROR IS THE  
01:55PM 13 ONLY EXPLANATION, I THINK TO THEM WHAT THAT MEANS IS THAT THIS  
01:55PM 14 NUMERICAL VALUE THAT CAME BACK FROM THERANOS COULD NOT  
01:56PM 15 ACCURATELY REPRESENT, COULD NOT ACCURATELY CORRESPOND TO WHAT  
01:56PM 16 IS HAPPENING IN THE PATIENT'S BODY, AND THAT LEAVES LAB ERROR,  
01:56PM 17 WHICH ENCOMPASSES, I THINK THEY WOULD SAY -- AND I DON'T MEAN  
01:56PM 18 TO SPEAK FOR THEM -- BUT I THINK THEY WOULD SAY THAT WHEN THEY  
01:56PM 19 SAY "LAB ERROR," THAT ENCOMPASSES ANYTHING FROM INHERENTLY  
01:56PM 20 FLAWED TESTING METHODS TO SAMPLE MISHANDLING TO ANY NUMBER OF  
01:56PM 21 OTHER THINGS.

01:56PM 22 THEY'RE NOT GOING TO TESTIFY ABOUT THE DEFICIENCIES IN  
01:56PM 23 THERANOS'S LAB PRACTICES OR FLAWS IN THE THERANOS DEVICE. THEY  
01:56PM 24 DON'T HAVE INSIGHT INTO THAT, SO THEY WON'T BE OFFERING THOSE  
01:56PM 25 OPINIONS. WHEN THEY SAY "LAB ERROR," I THINK THEY SIMPLY MEAN

01:56PM 1 THE RESULT IS ERRONEOUS AND THE SOURCE OF THE ERROR IS  
01:56PM 2 SOMEWHERE ON THE THERANOS SIDE BECAUSE THE NUMBER SIMPLY  
01:56PM 3 DOESN'T MATCH WHAT MUST BE THE REALITY OF THE PATIENT'S ACTUAL  
01:56PM 4 HEALTH CONDITION.

01:56PM 5 THE COURT: THANK YOU. SO DOES THAT SAY THAT THE  
01:56PM 6 WITNESS WOULD TESTIFY, I ORDERED A TEST, I RECEIVED THE RESULT,  
01:57PM 7 IT WAS SO EXTRAORDINARY OR SO DIFFERENT THAN NORMAL TESTING  
01:57PM 8 THAT I RETESTED AND GOT A DIFFERENT RESULT WHICH WAS MORE  
01:57PM 9 ACCURATE. THE TEST WAS IN ERROR AND IT CAME FROM THERANOS, AND  
01:57PM 10 THAT'S ENOUGH, WITHOUT SAYING "LAB ERROR," WHICH I THINK IS THE  
01:57PM 11 OFFENSIVE TERM HERE.

01:57PM 12 MR. BOSTIC: CORRECT, YOUR HONOR. I THINK THAT  
01:57PM 13 COULD BE ANOTHER WAY TO CONVEY THE SAME IDEA AND THAT WOULD BE  
01:57PM 14 THE CORE OF THEIR TESTIMONY.

01:57PM 15 OF COURSE IT WOULD INCLUDE ADDITIONAL JUSTIFICATIONS,  
01:57PM 16 BACKGROUND AND CONTEXT SUPPORTING THAT OPINION.

01:57PM 17 THE COURT: SURE. THEY'RE NOT GOING TO BE PERMITTED  
01:57PM 18 TO TESTIFY ABOUT ACCURACY OR RELIABILITY OF TESTING OVERALL  
01:57PM 19 BECAUSE THEY DON'T HAVE THAT EXPERTISE, OR ANY FLAW IN THE  
01:57PM 20 THERANOS TECHNOLOGY BECAUSE THEY DON'T HAVE THAT EXPERTISE.

01:57PM 21 MR. BOSTIC: CORRECT, YOUR HONOR.

01:57PM 22 I THINK THE ONLY POINT I WOULD MAKE IS THAT TO THE EXTENT  
01:57PM 23 THAT A DOCTOR DECIDED TO STOP USING THERANOS TESTING SERVICES  
01:58PM 24 AFTER HAVING A BAD EXPERIENCE WITH AN INACCURATE OR MULTIPLE  
01:58PM 25 IN ACCURATE RESULTS, THE GOVERNMENT BELIEVES THAT THAT DOCTOR

01:58PM 1 SHOULD BE ALLOWED TO EXPLAIN THE REASONS FOR THAT DECISION.

01:58PM 2 THAT'S NOT THE SAME THING AS SAYING, HERE'S WHAT THE  
01:58PM 3 PROBLEM IS AT THERANOS. I KNOW WHAT THE EXPLANATION IS.

01:58PM 4 THAT'S NOT AN OPINION. IT'S NOT AN EXPERT OPINION. IT'S  
01:58PM 5 SIMPLY EXPLAINING A DECISION THAT THE DOCTOR MADE, AND WE THINK  
01:58PM 6 THAT'S RELEVANT TO SHOW THE MATERIALITY OF THE ACCURACY OF  
01:58PM 7 THESE TESTS AND TO PROVIDE INFORMATION TO THE JURY THAT WILL  
01:58PM 8 HELP THEM, OR AT LEAST INFORM THEM AS TO THE DOCTOR'S  
01:58PM 9 CREDIBILITY WHEN IT CAME TO HOW THE DOCTOR RESPONDED TO THESE  
01:58PM 10 SITUATIONS.

01:58PM 11 THE COURT: THANK YOU.

01:58PM 12 THERE WAS ONE OTHER PIECE, I THINK IT WAS POTENTIAL  
01:58PM 13 TESTIMONY FROM A PHYSICIAN THAT MIGHT SAY THAT THERE WAS NO, NO  
01:58PM 14 BIOLOGICAL EXPLANATION FOR THE RESULTS THAT THEY RECEIVED ON A  
01:58PM 15 PARTICULAR TEST.

01:58PM 16 MR. BOSTIC: I THINK THAT WOULD BE ANOTHER  
01:58PM 17 PERMISSIBLE WAY TO CONVEY THIS IDEA, THIS BASIC IDEA THAT  
01:59PM 18 THERANOS PROVIDED AN ASSAY RESULT THAT COULD NOT HAVE BEEN  
01:59PM 19 ACCURATE.

01:59PM 20 MS. TREFZ: AND FOR THAT, YOUR HONOR, I WOULD SAY  
01:59PM 21 THAT WE SHOULD HAVE THE OPPORTUNITY TO TEST WHETHER THAT IS  
01:59PM 22 ACTUALLY -- AND BY "TEST" I MEAN EXAMINE THE WITNESS.

01:59PM 23 THE COURT: CROSS-EXAMINATION.

01:59PM 24 MS. TREFZ: WELL, NOT JUST CROSS-EXAMINE THEM, BUT  
01:59PM 25 IN A DAUBERT OR VOIR DIRE, BECAUSE I'M NOT SURE THAT THE

DOCTORS HAVE THE ABILITY TO SAY OR HAVE RELIABLY CONCLUDED THAT THERE'S NO BIOLOGICAL EXPLANATION FOR A PARTICULAR RESULT.

IT DEPENDS ON THE DOCTOR, AND AS -- ONCE WE GET INTO THE ACTUAL OPINIONS THAT WERE -- THAT WE THINK ARE STILL AT ISSUE, THEN, YOU KNOW, I THINK THERE IS A QUESTION IN A LOT OF SITUATIONS WHETHER THE DOCTOR EVEN IS REFERRING TO SOMETHING SPECIFIC OR WHETHER THE DOCTOR IS JUST KIND OF TALKING FROM MEMORY, AND I WOULD SAY FOR THAT -- FOR ALL OF THOSE THINGS, INCLUDING THIS KIND OF THERE'S NO BIOLOGICAL EXPLANATION, IF IT'S NOT TIED TO A VERY SPECIFIC KIND OF PATIENT FILE AND A VERY SPECIFIC EXPLANATION, THAT RAISES REAL 702 CONCERNS AND SO WE WOULD WANT TO -- WE THINK WITH THESE PARTICULAR DOCTORS THERE'S A VERY -- THE COURT'S GATEKEEPING FUNCTION IS ACTUALLY EXTREMELY IMPORTANT BECAUSE OF THIS MIXED FACT AND EXPERT ROLE THAT THEY PLAY, AND THE KIND OF WAY IN WHICH THIS PERCIPIENT WITNESS TESTIMONY CAN GET OUT OF HAND AND KIND OF VENTURE INTO EXPERT AREAS THAT WE THINK WILL REALLY BE ESPECIALLY PREJUDICIAL IN THIS KIND OF CASE.

THE COURT: ALL RIGHT. I THINK I UNDERSTAND THAT. THANK YOU FOR THAT.

WHEN I LOOKED AT THIS, THE THOUGHT OCCURRED TO ME THAT THE DOCTORS WOULD TESTIFY BASED ON THEIR KNOWLEDGE AS MEDICAL PHYSICIANS, AND PART OF THAT, BEING A DOCTOR, IS KNOWING -- THEY HAVE TO KNOW A LITTLE BIT OF BIOLOGY, AND THEY CAN CERTAINLY TESTIFY ABOUT NUMBERS THAT WERE, FOR EXAMPLE, NOT

POSSIBLE IN A HUMAN BEING OR NOT POSSIBLE GIVEN THIS CONDITION  
AND STATE THE REASONS WHY THEIR MEDICAL TRAINING SUGGESTS THAT.

I THOUGHT THAT SOME OF THESE DOCTORS, AT LEAST AS  
PHYSICIANS, WOULD BE ABLE TO DO THAT AS TO SOME OF THESE TEST  
RESULTS. BUT AS YOU SAY, WE'LL SEE.

MS. TREFZ: I THINK IT DEPENDS.

THE COURT: OKAY. THANK YOU.

THANK YOU, MR. BOSTIC.

MS. TREFZ: OKAY. IF I CAN JUST MOVE ON TO KIND OF  
THE FOUR CATEGORIES OF OPINIONS THAT I THINK WE HAVE LEFT HERE.

THE FIRST SET OF OPINIONS IS OPINIONS REGARDING THERANOS  
RESULTS THAT ARE PURPORTEDLY BASED ON SOME SET OF PATIENT  
RESULTS, BUT FOR WHICH NO PATIENTS HAVE BEEN IDENTIFIED, AND AN  
EXAMPLE OF THIS IS IN THE OPINIONS REFLECTED IN THE DISCLOSURES  
FOR DR. ASIN, AND IF YOU LOOK AT EXHIBIT 5 TO OUR MOTION, TO  
OUR OMNIBUS SET OF EXHIBITS, PAGE 7, THE BOTTOM PARAGRAPH JUST  
BY WAY OF EXAMPLE, THERE'S A DISCLOSURE TO HBA1C TESTS.

AND THIS IS A TEST, AS THE COURT MAY KNOW, BUT JUST FOR  
THE BENEFIT OF THE RECORD, IT IS USED FOR -- IT'S USED TO  
MONITOR BLOOD SUGAR CONTROL AND WHAT IT DOES IS MEASURE THE  
PERCENTAGE OF A PATIENT'S HEMOGLOBIN THAT IS GLYCATED AND IT'S  
COMMONLY USED IN MONITORING TYPE 2 DIABETES.

SO DR. ASIN IS DISCLOSED AS SAYING -- OR AS POTENTIALLY  
TESTIFYING THAT THERANOS A1C TESTS WERE EITHER TOO HIGH OR TOO  
LOW, THE THERANOS TESTS WERE NOT ACCURATE.

02:02PM 1 AND THIS TYPE OF DISCLOSURE WE THINK IS PROBLEMATIC FOR  
02:03PM 2 ONE PRIMARY REASON, WHICH IS THAT IT DOESN'T DISCLOSE THE BASES  
02:03PM 3 OR REASONS FOR DR. ASIN'S OPINION. IT DOESN'T TALK ABOUT  
02:03PM 4 WHETHER HE'S SAYING -- IT DOESN'T EXPLAIN WHETHER HE'S BASING  
02:03PM 5 THIS ON ONE DISCLOSURE OR ONE RESULT OR A THOUSAND, IT DOESN'T  
02:03PM 6 DISCLOSE WHETHER HE'S TALKING ABOUT PATIENTS WHO HAVE TYPE 2  
02:03PM 7 DIABETES OR NORMAL OR DO NOT, AND IT DOESN'T TALK ABOUT THE  
02:03PM 8 TIME PERIOD FOR WHICH HE'S COVERING, WHICH IS IMPORTANT  
02:03PM 9 BECAUSE -- AND THIS GOES A LITTLE BIT TO ONE OF THE ISSUES THAT  
02:03PM 10 YOU WERE DISCUSSING WITH MR. WADE AND MS. SAHARIA EARLIER,  
02:03PM 11 WHICH IS THAT THERE WAS A TIME PERIOD FOR PATIENTS TESTED IN  
02:03PM 12 ARIZONA WHERE THERANOS HBA1C TESTS WERE NOT RUN ON -- WELL, ANY  
02:03PM 13 TEST THAT WAS RUN IN ARIZONA WAS RUN ON A COMMERCIAL DEVICE,  
02:04PM 14 WAS NOT RUN ON THERANOS TECHNOLOGY, AND THERE WAS A TIME PERIOD  
02:04PM 15 WHEN IT WAS WELL-KNOWN WITHIN THERANOS AND DISCLOSED TO DOCTORS  
02:04PM 16 THAT THERE WAS ACTUALLY AN ISSUE WITH THE REAGENT THEY WERE  
02:04PM 17 USING FROM A THIRD PARTY -- FROM THE THIRD PARTY MANUFACTURER  
02:04PM 18 OF THE MACHINE, SIEMENS, AND SIEMENS HAD ISSUED A RECALL NOTICE  
02:04PM 19 BASED ON THIS HBA1C REAGENT AND --

02:04PM 20 THE COURT: WHAT IS THE TIME STAMP OF THAT?

02:04PM 21 MS. TREFZ: THE TIME PERIOD OF THAT IS BASICALLY  
02:04PM 22 SUMMER TO FALL 2014. AND SO TO THE EXTENT THAT DR. ASIN OR,  
02:04PM 23 ALTERNATIVELY, DR. PAGE IS BASING THEIR EXPERT OPINIONS ABOUT  
02:04PM 24 HBA1C TESTS AND THE PURPORTED INACCURACY OF THEM ON THIS TIME  
02:04PM 25 PERIOD, THAT REALLY DOESN'T GO TO THERANOS TECHNOLOGY AT ALL.

02:04PM 1 I THINK THAT THAT'S ONE OF THE KIND OF -- IT KIND OF  
02:05PM 2 CRYSTALLIZES TO ME WHY WE NEED TO BE ABLE TO KIND OF UNDERSTAND  
02:05PM 3 THE BASES FOR THIS, AND ALSO WHY WE REALLY NEED TO UNDERSTAND  
02:05PM 4 HOW THE GOVERNMENT IS USING THIS EVIDENCE TO GET TO THE  
02:05PM 5 ACCURACY AND RELIABILITY OF THERANOS TECHNOLOGY.

02:05PM 6 THE COURT: SO ARE YOU SAYING THAT BECAUSE THE  
02:05PM 7 TESTING IN THOSE EXAMPLES WERE NOT RUN ON THERANOS MACHINES,  
02:05PM 8 BUT ON THIRD PARTY MACHINES, THAT THAT IS OUTSIDE OF THE --  
02:05PM 9 THAT'S CONDUCT OUTSIDE OF THE INDICTMENT?

02:05PM 10 MS. TREFZ: I'M SAYING IT MAY NOT BE RELEVANT AT ALL  
02:05PM 11 BECAUSE IT'S NOT RUN ON THERANOS TECHNOLOGY, OR AT THE VERY  
02:05PM 12 LEAST WE NEED TO BE ABLE TO KIND OF PRESSURE TEST WHETHER THE  
02:05PM 13 OPINION, WHETHER THE OPINIONS OF THESE DOCTORS FALL WITHIN THAT  
02:05PM 14 SCOPE.

02:05PM 15 BUT I'M NOT SURE WHY IT'S RELEVANT OR WHY IN 702 LANGUAGE  
02:06PM 16 IT FITS THE CASE IF IT GOES TO, YOU KNOW, COMMERCIAL  
02:06PM 17 TECHNOLOGY.

02:06PM 18 THE COURT: AND I DON'T MEAN TO GET INTO THE WEEDS  
02:06PM 19 HERE OR GO SOMEWHERE ELSE, BUT IF THE INDICTMENT SAYS THAT  
02:06PM 20 THERANOS REPRESENTED THAT THEY COULD DO ACCURATE AND RELIABLE  
02:06PM 21 AND CONSISTENT TESTING, DOES IT SAY ON THEIR PROPRIETARY  
02:06PM 22 MACHINES?

02:06PM 23 MS. TREFZ: YOUR HONOR, IT SAYS THERANOS TECHNOLOGY  
02:06PM 24 CONSISTENTLY PRODUCED ACCURATE AND RELIABLE RESULTS. I THINK  
02:06PM 25 THAT'S IN PARAGRAPH 16 OF THE THIRD SUPERSEDING INDICTMENT.



02:06PM 1 SO I THINK IT'S A REAL QUESTION AS TO WHETHER IT FALLS  
02:06PM 2 OUTSIDE.

02:06PM 3 THE COURT: OKAY. OKAY.

02:06PM 4 MS. TREFZ: SO THE REASON WHY I RAISE THAT,  
02:06PM 5 YOUR HONOR, IS BECAUSE IT'S IMPORTANT FOR US TO KNOW THE BASES  
02:06PM 6 AND REASONS FOR THE OPINIONS, AND IT'S IMPORTANT NOT ONLY FOR  
02:06PM 7 RULE 16 PURPOSES, BUT IT'S IMPORTANT FOR THE 702 GATEKEEPING  
02:07PM 8 PURPOSE AS WELL.

02:07PM 9 JUST LAST YEAR IN A CASE CALLED VALENCIA-LOPEZ THE  
02:07PM 10 NINTH CIRCUIT EMPHASIZED, YOU KNOW, THAT THE 702 GATEKEEPING  
02:07PM 11 FUNCTION, OF COURSE AS YOUR HONOR I'M SURE IS WELL AWARE,  
02:07PM 12 HAPPENS BEFORE THE WITNESS TESTIFIES.

02:07PM 13 AND IN ORDER TO DO THAT, THEY NEED TO HAVE -- THE COURT  
02:07PM 14 NEEDS TO HAVE AN ACTUAL EXPLANATION OF THE METHODOLOGY USED AND  
02:07PM 15 WHAT THE BASES AND REASONS ARE SO THAT IT CAN PERFORM THAT  
02:07PM 16 GATEKEEPING FUNCTION.

02:07PM 17 AND THEN THE KIND OF THIRD POINT THAT I WOULD HAVE WITH  
02:07PM 18 RESPECT TO THIS CATEGORY OF OPINIONS IS THAT FOR THESE MIXED  
02:07PM 19 FACT AND EXPERT WITNESSES, THOSE FUNCTIONS I THINK WE WOULD  
02:07PM 20 SUBMIT ARE EVEN HEIGHTENED HERE BECAUSE OF THE ROLES THAT THESE  
02:07PM 21 DOCTORS PLAY. YOU KNOW, THE CASES MAKE CLEAR THAT WHEN -- THAT  
02:07PM 22 WHEN EXPERT TESTIMONY IS BASED ON EXPERIENCE, YOU KNOW, RATHER  
02:07PM 23 THAN SOME, YOU KNOW, SPECIFIC SCIENTIFIC TESTING OR SOMETHING  
02:08PM 24 LIKE THAT, THEN THE COURT'S GATEKEEPING FUNCTION IS  
02:08PM 25 ESPECIALLY -- MUST ESPECIALLY BE ENGAGED.

02:08PM 1 AND THE COMMON EXAMPLE IS WITH RESPECT TO DEA AGENTS. YOU  
02:08PM 2 KNOW, THIS IS THE ONE THAT IS OFTEN IN THE CASES, DEA AGENTS  
02:08PM 3 GET UP AND TALK ABOUT COMMUNICATIONS WITH RESPECT TO DRUG  
02:08PM 4 CARTELS AND THEY'RE CERTIFIED AS AN EXPERT BECAUSE THEY'VE  
02:08PM 5 SPENT YEARS INVESTIGATING DRUG CARTELS.

02:08PM 6 IN THOSE CASES, YOU KNOW, THE COURTS ACKNOWLEDGE THIS  
02:08PM 7 PARTICULAR PREJUDICE OR RISK OF PREJUDICE THAT COMES FROM THESE  
02:08PM 8 EXPERTS OR THESE AGENTS BEING THE INVESTIGATING AGENT AND THEN  
02:08PM 9 TESTIFYING AS AN EXPERT AS TO SOME THINGS AND NOT AS AN EXPERT  
02:08PM 10 AS TO OTHERS.

02:08PM 11 HERE I WOULD SUBMIT THAT THIS IS -- THE RISK OF KIND OF  
02:08PM 12 BLEEDING FACT AND EXPERT TESTIMONY TOGETHER IS EVEN GREATER  
02:08PM 13 BECAUSE THESE INDIVIDUALS WILL BE INTRODUCING THEMSELVES AS  
02:09PM 14 MEDICAL DOCTORS AND, YOU KNOW, MEDICAL DOCTORS PROBABLY HAVE  
02:09PM 15 THAT EXTRA AUTHORITY OVER THEIR PATIENT'S OPINIONS.

02:09PM 16 SO I THINK WE REALLY NEED TO BE IN A POSITION TO BE ABLE  
02:09PM 17 TO TEST THAT.

02:09PM 18 I USED DR. ASIN AS AN EXAMPLE, BUT I WANTED TO JUST FLAG  
02:09PM 19 THAT THIS IS A CONCERN THAT IS RELEVANT TO THE DISCLOSURES FOR  
02:09PM 20 MS. EMBRY ON TESTOSTERONE, DR. LINNERTSON AND DR. SZMUC WITH  
02:09PM 21 RESPECT TO HCG -- AND THAT'S S-Z-M-U-C -- AND DR. PAGE WITH  
02:09PM 22 RESPECT TO HBA1C AS WELL.

02:09PM 23 THE COURT: SO IT'S NOT UNUSUAL TO HAVE FACT/EXPERT  
02:09PM 24 COMBINED, AND AS YOU KNOW, THERE ARE NINTH CIRCUIT INSTRUCTIONS  
02:10PM 25 THAT INFORM A JURY ABOUT THAT.

02:10PM 1 PART OF THE TRIAL PROCESS IS FOR THE TRIAL COURT TO INFORM  
02:10PM 2 THE JURY AS TO WHEN A WITNESS IS TESTIFYING AS AN EXPERT  
02:10PM 3 VIS-À-VIS A FACT WITNESS, AND THAT IS SOMETHING THAT CAN BE  
02:10PM 4 HANDLED INTERNALLY I THINK.

02:10PM 5 MS. TREFZ: I AGREE, YOUR HONOR.

02:10PM 6 I ONLY POINT IT OUT TO NOTE THAT IN THIS PARTICULAR CASE  
02:10PM 7 IT WILL BE REALLY IMPORTANT TO UNDERSTAND WHAT THEY'RE  
02:10PM 8 TESTIFYING ABOUT BASED ON JUST AS FACT WITNESSES AND WHAT IS  
02:10PM 9 EXPERT TESTIMONY BECAUSE THERE'S A REAL RISK OF KIND OF MIXING  
02:10PM 10 THOSE THINGS, AS THERE IS IN EVERY CASE.

02:10PM 11 SO THAT WAS THE FIRST SET OF OPINIONS.

02:10PM 12 THE SECOND SET OF OPINIONS THAT I WANTED TO MAKE SURE THAT  
02:10PM 13 WE HAVE IN MIND HERE IS OPINIONS REGARDING PURPORTED LACK OF  
02:10PM 14 PROBLEMS, ERRORS, OR ISSUES WITH RESPECT TO OTHER LABS.

02:10PM 15 HERE, YOU KNOW, FOR MANY -- THERE ARE SEVERAL OF THE  
02:10PM 16 EXPERTS -- AND I THINK MR. BOSTIC EARLIER TODAY USED THE  
02:10PM 17 EXAMPLE OF MS. EMBRY WHO IS DISCLOSED AS POTENTIALLY TESTIFYING  
02:11PM 18 THAT THE MEDICAL PROFESSIONAL HAD NEVER EXPERIENCED CLINICAL  
02:11PM 19 ERRORS WITH OTHER LAB COMPANIES.

02:11PM 20 AN EXAMPLE OF THIS IS IN EXHIBIT 4, PAGE 3 OF -- TO OUR  
02:11PM 21 SET. AND JUST TO QUOTE FROM THAT, IT SAYS SHE WILL FURTHER  
02:11PM 22 TESTIFY THAT IN 20 PLUS YEARS USING SONORA QUEST AND LABCORP,  
02:11PM 23 SHE HAS NEVER EXPERIENCED ANY CLINICAL ERRORS WITH THEIR LAB  
02:11PM 24 RESULTS, AND SIMILAR DISCLOSURES WERE MADE WITH RESPECT TO  
02:11PM 25 SEVERAL OF THE OTHER DOCTORS.

02:11PM 1           THERE'S NO DISCLOSURE HERE AS TO HOW ANY OF THESE DOCTORS  
02:11PM 2           CAME TO THIS SWEEPING CONCLUSION THAT THEY HAD NEVER  
02:11PM 3           EXPERIENCED CLINICAL ERRORS WITH OTHER LAB COMPANIES, OR EVEN  
02:11PM 4           REALLY WHAT THAT MEANS. DOES IT MEAN THAT THEY NEVER  
02:11PM 5           QUESTIONED THE ACCURACY OF A TEST? DOES IT MEAN THAT THEY  
02:11PM 6           NEVER HAD A PATIENT REPEAT A TEST? THAT THEY NEVER  
02:12PM 7           CONCLUSIVELY DETERMINED THAT THERE WAS AN ERROR, OR THAT THEY  
02:12PM 8           WERE NEVER NOTIFIED THAT THERE WAS AN ERROR?

02:12PM 9           KIND OF SEPARATELY FROM THIS DEFINITIONAL ISSUE, ALSO,  
02:12PM 10          WHAT IS THIS BASED ON? IS IT SIMPLY BASED ON THEIR MEMORY, I  
02:12PM 11          DON'T REMEMBER HAVING A CLINICAL ERROR WITH ANOTHER LAB? OR IS  
02:12PM 12          IT BASED ON A SYSTEMATIC VIEW OF THEIR PATIENT RECORDS? AND IF  
02:12PM 13          SO, KIND OF HOW DID THEY GO ABOUT DOING THAT HERE?

02:12PM 14          I THINK UNDERSTANDING WHETHER THESE OPINIONS ARE BASED ON  
02:12PM 15          SUFFICIENT DATA AND ALSO RELIABLE METHODS RELIABLY APPLIED,  
02:12PM 16          WHICH IS WHAT 702 REQUIRES, IS ESPECIALLY IMPORTANT BECAUSE  
02:12PM 17          THESE SWEEPING CONCLUSIONS, WHEN CONSIDERED IN THE CONTEXT OF  
02:12PM 18          PUBLICLY AVAILABLE INFORMATION, SEEM TO HAVE A HIGH LIKELIHOOD  
02:12PM 19          OF BEING UNRELIABLE.

02:12PM 20          AND JUST TO GIVE AN EXAMPLE AS TO WHY, WE TALKED EARLIER,  
02:12PM 21          OR YOU DID WITH MR. WADE, ABOUT WELL DOCUMENTED ERROR RATES.

02:13PM 22          AND GIVEN, YOU KNOW, WELL DOCUMENTED ERROR RATES AND LAB  
02:13PM 23          TESTING AND THE NUMBER OF TESTS THAT THESE DOCTORS SAID THAT  
02:13PM 24          THEY PERFORMED OR REVIEWED IN THEIR LIFETIME, IT IS HIGHLY  
02:13PM 25          UNLIKELY THAT THEY NEVER EXPERIENCED ANOTHER LAB ERROR. THEY

02:13PM 1 JUST POTENTIALLY DON'T REMEMBER IT OR THEY WERE NEVER INFORMED  
02:13PM 2 OF IT.

02:13PM 3 SECOND, WE KNOW FROM EVIDENCE THAT WILL PRESUMABLY BE AT  
02:13PM 4 ISSUE IN THIS CASE, LIKE THE HBA1C EXAMPLE THAT I GAVE YOU  
02:13PM 5 EARLIER, THAT SOMETIMES COMMERCIAL DEVICE MANUFACTURERS RECALL  
02:13PM 6 REAGENTS IN OTHER PARTS OF THEIR MACHINES, AND THAT DOESN'T  
02:13PM 7 ALWAYS REQUIRE PATIENT NOTIFICATION. IT'S KIND OF A  
02:13PM 8 COMPLICATED ISSUE.

02:13PM 9 BUT I WOULD JUST NOTE THAT JUST BECAUSE THERE IS A RECALL  
02:13PM 10 IN A PARTICULAR REAGENT OR A TEST RESULT MIGHT BE OFF, THAT  
02:13PM 11 DOESN'T AUTOMATICALLY MEAN THAT YOU MUST INFORM THE DOCTOR.

02:13PM 12 THE COURT: SO THIS IS -- IT SOUNDS LIKE THIS IS A  
02:13PM 13 GOOD FODDER FOR CROSS-EXAMINATION.

02:14PM 14 MS. TREFZ: I UNDERSTAND WHY YOU WOULD SAY THAT,  
02:14PM 15 YOUR HONOR.

02:14PM 16 BUT IT'S EXTREMELY PREJUDICIAL WHEN IT COMES IN AS THE  
02:14PM 17 IDEA OF I'VE NEVER HAD ANOTHER LAB ERROR.

02:14PM 18 AND I DO THINK THAT THAT IS CLEARLY THE STUFF OF EXPERT  
02:14PM 19 TESTIMONY BECAUSE THE DECISION ITSELF AS TO WHETHER SOMETHING  
02:14PM 20 IS AN ERROR OR NOT OR IS CORRECT IS CLEARLY BASED ON MEDICAL  
02:14PM 21 OPINION, AND IT'S NOT AS IF THESE DOCTORS HAVE SAT THERE FOR  
02:14PM 22 YEARS AND BEEN LIKE, I'M TALLYING UP THE NUMBER OF LAB ERRORS  
02:14PM 23 THAT I MAKE. THIS IS NOT SIMPLY PERCIPIENT WITNESS TESTIMONY.

02:14PM 24 THEY ARE COMBINING ALL OF THESE INDIVIDUAL DECISIONS,  
02:14PM 25 PRESUMABLY, OF THEIR PATIENTS AND SAYING, IF YOU TAKE THEM ALL

02:14PM 1 TOGETHER, I'VE NEVER EXPERIENCED ANOTHER LAB ERROR AND THAT'S  
02:14PM 2 THE OPINION THAT I'M NOW GOING TO GIVE.

02:14PM 3 SO I WOULD SAY THAT THAT IS OBVIOUSLY THE STUFF OF EXPERT  
02:14PM 4 TESTIMONY.

02:14PM 5 AND OUR POINT HERE IS THAT WE DON'T KNOW THE BASIS FOR  
02:15PM 6 THIS, AND IT NEEDS TO BE DISCLOSED AND THE COURT NEEDS TO HAVE  
02:15PM 7 THE OPPORTUNITY TO PERFORM THIS GATEKEEPING FUNCTION BECAUSE OF  
02:15PM 8 THE SUBSTANTIAL PREJUDICE THAT WOULD COME FOR IT, OR COME FROM  
02:15PM 9 IT.

02:15PM 10 I HEARD MR. BOSTIC SAY EARLIER THAT THE IDEA THAT OTHER  
02:15PM 11 LAB ERRORS IS -- THAT OTHER LABS HAD ERRORS, OR DIDN'T, IS, YOU  
02:15PM 12 KNOW, RELEVANT IN THIS CASE, AND IF -- I QUESTION WHETHER  
02:15PM 13 THAT'S THE CASE BECAUSE WHAT WE'RE REALLY TALKING ABOUT IS  
02:15PM 14 THERANOS, NOT OTHER LABS, OR THAT'S WHAT THE ALLEGATIONS IN THE  
02:15PM 15 INDICTMENT GO TO.

02:15PM 16 BUT EVEN IF NOT, IT REALLY DOES OPEN THE DOOR TO KIND OF  
02:15PM 17 QUESTIONING WHETHER THAT IS -- YOU KNOW, WHETHER THAT'S TRUE OF  
02:15PM 18 THESE LAB COMPANIES, WHICH HAS NOT REALLY BEEN AN ISSUE OF  
02:15PM 19 DISCOVERY IN THIS CASE.

02:15PM 20 AND FRANKLY, IT MEANS THAT PRETTY MUCH ANY ANECDOTAL  
02:15PM 21 RESULT, INCLUDING SOMETHING THAT IS -- YOU KNOW, INCLUDING FROM  
02:15PM 22 DOCTORS THAT HAVE NOTHING TO DO WITH THERANOS COULD COME IN AND  
02:15PM 23 SAY, OH, BY THE WAY, I RECEIVED -- I DID HAVE A LAB ERROR FROM  
02:16PM 24 SONORA QUEST, I DID HAVE A LAB ERROR FROM LABCORP, OR ANY OF  
02:16PM 25 THESE OTHER LAB COMPANIES, AND I THINK THAT KIND OF BLOWS THE

02:16PM 1 DOORS OFF OF THE POTENTIAL, YOU KNOW, SCOPE OF THIS VERY LONG  
02:16PM 2 CASE AND KIND OF -- AND SO I THINK OVERALL MY POINT IS THAT, AS  
02:16PM 3 A FIRST STEP, WE NEED TO UNDERSTAND WHAT THE BASIS FOR THESE  
02:16PM 4 EXTREMELY SWEEPING STATEMENTS ARE BECAUSE THERE'S REASON TO  
02:16PM 5 DOUBT WHETHER THEY ARE RELIABLE CONCLUSIONS.

02:16PM 6 SO AT THIS POINT I WANTED TO TOUCH JUST BRIEFLY ON THE  
02:16PM 7 TIMING ISSUE BECAUSE I UNDERSTAND WITH RESPECT TO -- I  
02:16PM 8 UNDERSTAND THAT THE GOVERNMENT IS SAYING THAT IT IS TRYING TO  
02:16PM 9 GET MORE INFORMATION ON WHAT THESE DOCTORS ARE BASING THEIR  
02:16PM 10 OPINIONS ON.

02:16PM 11 THE GOVERNMENT FOCUSSED ON FOUR MONTHS UNTIL TRIAL, BUT I  
02:17PM 12 WOULD JUST NOTE THAT IT IS 14 MONTHS, 14 MONTHS PAST THE  
02:17PM 13 DISCLOSURE DEADLINE FOR THESE EXPERT DISCLOSURES FOR THE  
02:17PM 14 GOVERNMENT'S CASE.

02:17PM 15 THE GOVERNMENT HAS BEEN SAYING IT IS TRIAL READY SINCE  
02:17PM 16 JULY OF LAST YEAR AT LEAST, AND IT SEEMS TO ME THAT IF THE  
02:17PM 17 GOVERNMENT WANTS TO ELICIT THESE OPINIONS, WHICH IS AT LEAST IN  
02:17PM 18 SOME WAY UP TO THEM, THEY CHOOSE, SUBJECT TO RELEVANCE AND OUR  
02:17PM 19 OBJECTIONS, BUT IF THE GOVERNMENT IS COMING IN HERE AND WANTING  
02:17PM 20 TO ELICIT THESE OPINIONS AT TRIAL, IT CERTAINLY SHOULD HAVE HAD  
02:17PM 21 ENOUGH TIME TO FIGURE OUT WHY ITS WITNESSES BELIEVE WHAT THEY  
02:17PM 22 BELIEVE AND, FRANKLY, FIGURING OUT THE BASES FOR THESE  
02:17PM 23 OPINIONS, I WOULD HAVE THOUGHT, IS SOMETHING THAT YOU WOULD  
02:17PM 24 WANT TO DO WHEN YOU'RE INTERVIEWING THE WITNESSES THE FIRST  
02:17PM 25 TIME OR BEFORE YOU MAKE BROAD ACCURACY ACCUSATIONS.

02:17PM 1 BUT AT THE VERY LEAST I GUESS MY POINT, YOUR HONOR, IS  
02:17PM 2 THAT WE NEED THE OPPORTUNITY FOR -- ONCE WE GET ADEQUATE  
02:18PM 3 DISCLOSURES, IF THEY EVER COME, WE NEED THE OPPORTUNITY TO  
02:18PM 4 HAVE -- YOU KNOW, TO TEST THE RELIABILITY OF THEIR OPINIONS  
02:18PM 5 BEFORE THOSE DOCTORS GET UP AND TESTIFY.

02:18PM 6 THE THIRD SET OF OPINIONS -- AND HERE THIS IS -- I THINK I  
02:18PM 7 CAN DEFER TO THE COURT A LITTLE BIT ON WHETHER YOU WANT TO  
02:18PM 8 DISCUSS THIS NOW OR WITH RESPECT TO THE NEXT MOTION, WHICH I  
02:18PM 9 ALSO HAVE THE PLEASURE OF ARGUING, BUT IT'S STATEMENTS ABOUT  
02:18PM 10 THESE KIND OF HYPOTHETICAL INFLAMMATORY CONSEQUENCES THAT  
02:18PM 11 DIDN'T HAPPEN, AND OUR MOTION IN THAT REGARD COVERS BOTH,  
02:18PM 12 BUT -- OR COVERS BOTH CUSTOMER TESTIMONY IN THAT RESPECT.

02:18PM 13 THE COURT: WELL, LET ME -- I'LL ACCEPT YOUR  
02:18PM 14 INVITATION TO SPEAK ABOUT IT. THANK YOU.

02:18PM 15 MS. TREFZ: OKAY.

02:18PM 16 THE COURT: LET ME SAY, JUST TO HELP THINGS ALONG IN  
02:18PM 17 THE CONVERSATION, AND TO GIVE THE GOVERNMENT A HEADS UP, I DO  
02:19PM 18 HAVE SOME CONCERNS ABOUT ALLOWING SOME OF THE TESTIMONY, THE  
02:19PM 19 EMOTIONAL TESTIMONY ABOUT HYPOTHETICAL CONDITIONS AND WHAT THAT  
02:19PM 20 MEANT TO INDIVIDUALS. SO I DO HAVE SOME CONCERNS ABOUT THAT,  
02:19PM 21 SO THE GOVERNMENT'S -- I'M JUST PUTTING THE GOVERNMENT ON  
02:19PM 22 NOTICE. I'D LIKE TO HEAR FROM YOU ABOUT WHY THAT HAS RELEVANCE  
02:19PM 23 AND WHY IT SHOULD BE ADMITTED.

02:19PM 24 I HAVE SOME DOUBTS -- IN THE SPIRIT OF FULL DISCLOSURE, I  
02:19PM 25 HAVE SOME DOUBTS ABOUT IT, BUT I JUST WANT TO LET YOU KNOW.



02:19PM 1 THAT MIGHT HELP YOUR ARGUMENT, TOO.

02:19PM 2 MS. TREFZ: RIGHT. I APPRECIATE THAT, YOUR HONOR.

02:19PM 3 SO I'M GOING TO MOVE ON. THAT'S A BUCKET OF EXPERT  
02:19PM 4 TESTIMONY, BUT WE'LL TALK ABOUT THAT NEXT, I WOULD SAY IN THE  
02:19PM 5 INTEREST OF BEING BRIEF, BUT I THINK WE'RE BEYOND THAT.

02:19PM 6 AND THEN THE FOURTH CATEGORY IS OPINIONS REGARDING  
02:19PM 7 THERANOS RESULTS OF IDENTIFIED PATIENTS, AND THAT I LEFT IT FOR  
02:19PM 8 LAST BECAUSE I KNOW YOU'VE ALREADY BEEN DISCUSSING IT WITH  
02:19PM 9 MR. WADE AND IT REALLY GOES TO THE -- OUR OBJECTION THERE IS  
02:19PM 10 NOT REALLY ON DISCLOSURE BECAUSE I THINK FOR THOSE PATIENT --  
02:20PM 11 FOR THOSE OPINIONS WHERE THE DOCTOR HAS ACTUALLY IDENTIFIED A  
02:20PM 12 PATIENT, THEN WE HAVE WHAT WE NEED OR WE CAN SUBPOENA WHAT ELSE  
02:20PM 13 WE NEED.

02:20PM 14 BUT WE JUST NOTE THAT -- WE WOULD JUST MAKE THE ADDITIONAL  
02:20PM 15 POINT THAT FOCUSING ON THESE INDIVIDUAL ANECDOTAL ISSUES,  
02:20PM 16 DESPITE THEIR KIND OF -- DESPITE THEIR LIMITED PROBATIVE VALUE,  
02:20PM 17 AND ESPECIALLY IN THE CONTEXT OF A CASE WHERE THE GOVERNMENT  
02:20PM 18 DOESN'T HAVE KIND OF A SYSTEMIC DATA ANALYSIS, WE THINK IT'S  
02:20PM 19 EVEN MORE PREJUDICIAL BECAUSE IT SUGGESTS TO THE JURY THAT SUCH  
02:20PM 20 AN EXPERIENCE IS REPRESENTATIVE WHEN WE KNOW THAT THERE IS NO  
02:20PM 21 INDICATION THAT THAT'S NECESSARILY THE CASE.

02:20PM 22 SO WITH THAT, YOUR HONOR, I THINK I WOULD --

02:20PM 23 THE COURT: YIELD THE FLOOR?

02:20PM 24 MS. TREFZ: YEAH, TURN IT OVER.

02:20PM 25 THE COURT: OKAY.

02:21PM 1 MR. BOSTIC.

02:21PM 2 MR. BOSTIC: THANK YOU, YOUR HONOR.

02:21PM 3 I MENTIONED BEFORE, BUT LET ME JUST REITERATE, THAT THESE  
02:21PM 4 ARE NOT STANDARD EXPERT WITNESSES. THEY ARE MAINLY PERCIPIENT  
02:21PM 5 WITNESSES.

02:21PM 6 WE SPOKE BEFORE THE LUNCH BREAK ABOUT THE IMPORTANCE OF  
02:21PM 7 PATIENT VICTIM TESTIMONY IN THIS CASE, AND SO THE COURT KNOWS  
02:21PM 8 THE GOVERNMENT'S VIEWS THERE.

02:21PM 9 THE GOVERNMENT BELIEVES THAT IT'S EXTREMELY IMPORTANT TO  
02:21PM 10 THE VICTIMS' RIGHTS AND TO THE TRUTH SEEKING FUNCTION OF THE  
02:21PM 11 JURY THAT THEY HEAR FROM PATIENT VICTIMS WHO GOT INACCURATE  
02:21PM 12 THERANOS TEST RESULTS.

02:21PM 13 THE TESTIMONY OF DOCTORS REALLY GOES HAND IN HAND WITH THE  
02:21PM 14 TESTIMONY OF THOSE PATIENT VICTIMS.

02:21PM 15 A PATIENT CAN TESTIFY ABOUT THE PROMOTIONAL MATERIALS OR  
02:21PM 16 THE MARKETING MATERIALS THAT THEY WERE EXPOSED TO FROM  
02:22PM 17 THERANOS, ABOUT THEIR REASONS FOR CHOOSING THERANOS, ABOUT  
02:22PM 18 THEIR EXPERIENCES WITH THE COMPANY, THE RESULTS THAT THEY GOT.

02:22PM 19 SO, FOR EXAMPLE, A VICTIM CAN TESTIFY THAT SHE USED  
02:22PM 20 THERANOS FOR HCG, FOR A PREGNANCY TEST, AND SHE CAN TALK ABOUT  
02:22PM 21 WHY SHE CHOSE THERANOS AND GIVE HER VIEWS ON WHERE ACCURACY WAS  
02:22PM 22 IMPORTANT TO HER, AND SHE CAN RELAY THE RESULTS SHE RECEIVED  
02:22PM 23 WHEN SHE'S ON THE STAND.

02:22PM 24 BUT HER DOCTOR IS THE ONE WHO IS IN THE BEST POSITION TO  
02:22PM 25 TESTIFY REGARDING WHAT AN HCG TEST IS, HOW IS IT USED, WHY WAS

IT ORDERED IN THIS SPECIFIC PATIENT'S CASE, AND ALSO TO EXPLAIN WHAT RESULTS MEAN, SO INCLUDING THE SIGNIFICANCE OF THE SPECIFIC RESULTS RECEIVED BY THAT PARTICULAR PATIENT AT ISSUE.

SO FOR ALL OF THE REASONS THAT PATIENT TESTIMONY IS VITAL TO THIS CASE, DOCTOR TESTIMONY ABOUT THOSE SAME RESULTS IS VITAL AS A COMPLEMENT TO THAT PATIENT TESTIMONY.

WE HAVE SPOKEN ABOUT THE SCOPE OF THE ANTICIPATED DOCTOR TESTIMONY, SO I WON'T REITERATE THAT, ALTHOUGH I'M HAPPY TO ANSWER ANY QUESTIONS THAT THE COURT MIGHT HAVE.

AND I WILL GO THROUGH THE FOUR CATEGORIES OF OPINIONS THAT THE DEFENSE IS STILL OBJECTING TO.

LET ME FIRST JUST HIGHLIGHT THE FACT THAT THE STANDARD FOR ADMISSIBILITY OF EXPERT TESTIMONY IS FLEXIBLE. THE NINTH CIRCUIT TELLS US THAT. THAT'S THE DECISION IN LOPEZ MARTINEZ CITED BY BOTH PARTIES.

THE STANDARD FOR ADMISSIBILITY AND RELIABILITY DETERMINATIONS NEEDS TO BE FLEXIBLE FOR EXPERT TESTIMONY BECAUSE THERE ARE SO MANY DIFFERENT KINDS OF EXPERT OPINIONS THAT COME IN IN SUCH A WIDE VARIETY OF DIFFERENT CASE TYPES.

WHEN WE SEE THE CASES, THOUGH, THAT THE DEFENSE RELIES ON IN SEEKING TO EXCLUDE THESE OPINIONS, WE SEE PRIMARILY ONE CASE TYPE. WE SEE A CASE TYPE INVOLVING COMPLICATED ISSUES, DIFFICULT AND DISPUTED EXPERT OPINIONS THAT ARE BASED ON, OR SHOULD BE BASED ON, DETAILED ANALYSIS. AS WITH THE PATIENT TESTIMONY MOTION, THE DEFENSE RELIES ON A NUMBER OF CASES THAT

02:24PM 1 INVOLVE CAUSATION, A SPECIFIC ISSUE THAT IS KEY AND PIVOTAL IN  
02:24PM 2 A CASE TYPE THAT THE COURT IS NOW FACED WITH.

02:24PM 3 AS BEFORE, I THINK THE DEFENSE'S AUTHORITY IS OF LIMITED  
02:24PM 4 USEFULNESS HERE.

02:24PM 5 THE GOVERNMENT'S DISCLOSURE TO THE DEFENSE GOES INTO  
02:24PM 6 SUBSTANTIAL DETAIL ABOUT THESE WITNESSES' OPINIONS AND THE  
02:24PM 7 BASES THEREFORE. WE ARE WORKING STILL TO BOLSTER THAT AND  
02:24PM 8 PROVIDE ADDITIONAL INFORMATION.

02:24PM 9 BUT THE OPINIONS ARE WELL FOUNDED. IT'S HIGHLIGHTED IN  
02:24PM 10 THE GOVERNMENT'S BRIEFING, BUT EXPLAINED MORE FULLY IN THE  
02:24PM 11 COURT'S -- OR SORRY, IN THE GOVERNMENT'S DISCLOSURE TO THE  
02:25PM 12 DEFENSE THAT EACH OF THESE DOCTORS IS VERY, VERY WELL QUALIFIED  
02:25PM 13 TO RENDER THE KIND OF OPINION THAT THE GOVERNMENT ANTICIPATES  
02:25PM 14 THEY'LL RENDER. EACH OF THESE DOCTORS HAS USED AND REVIEWED  
02:25PM 15 RESULTS FROM THE RELEVANT ASSAYS, THOUSANDS, IF NOT TENS OF  
02:25PM 16 THOUSANDS OF TIMES. THIS IS LITERALLY WHAT THEY DO. THIS IS  
02:25PM 17 HOW THEY SPEND THEIR DAYS AS TREATING PHYSICIANS IS OBTAINING  
02:25PM 18 THESE LAB RESULTS AND THEN CORRELATING THOSE LAB RESULTS TO THE  
02:25PM 19 OTHER INFORMATION THAT THEY HAVE ABOUT THEIR PATIENT'S HEALTH  
02:25PM 20 CONDITION, PHYSICAL PRESENTATION, COMPLAINTS OR SELF-REPORTING  
02:25PM 21 FROM THE PATIENT.

02:25PM 22 AND BY VIRTUE OF THEIR FORMAL EDUCATION, THEIR TRAINING,  
02:25PM 23 AND AS I JUST REFERENCED, THEIR SUBSTANTIAL EXPERIENCE WORKING  
02:25PM 24 WITH THESE ASSAYS, THEY INEVITABLY BECOME EXPERTS IN EXACTLY  
02:25PM 25 WHAT WE'RE ASKING THEM TO DO, TAKE AN ASSAY RESULT AND PAIR IT

TO EVERYTHING ELSE THEY KNOW ABOUT THE PATIENT AND SEE WHAT THAT RELATIONSHIP IS.

AND IN THE CASES OF SOME THESE THERANOS TESTS, THE ANSWER IS THERE IS NO CORRELATION. THERE'S A MISMATCH. THESE TWO THINGS ARE INCOMPATIBLE. THE THERANOS ASSAY RESULT DOES NOT SQUARE WITH THE OTHER FACTS THAT I KNOW ABOUT MY PATIENT. AND WHEN THAT'S THE CASE, THEY SHOULD BE ABLE TO SIMPLY STATE THAT FACT.

SO THAT KIND OF OPINION IS RELATIVELY SIMPLE. IT'S NOT BASED ON A STATISTICAL ANALYSIS AS THE DEFENSE KEEPS WANTING TO SEE IN THIS CASE THEY CLAIM. IT'S BASED ON THE DOCTOR'S EDUCATION, TRAINING, AND EXPERIENCE. IT DOESN'T NECESSITATE A DETAILED MULTI-STEP METHODOLOGY. THERE'S NO WAY THAT THE DOCTOR COULD PRODUCE A 10 OR 20-PAGE REPORT EXPLAINING HOW HE OR SHE KNOWS THIS RESULT TO BE FALSE. IT SIMPLY IS A FACT KNOWN TO THE DOCTOR BASED ON THEIR EXPERIENCE AND THE AMOUNT OF EXPERIENCE THAT THEY HAVE WORKING WITH THAT SPECIFIC ASSAY.

SO IN POINTING TO OTHER EXAMPLES WHERE EXPERT OPINIONS WERE FAR MORE COMPLEX AND REQUIRED FAR MORE DETAILED PROOF AND A MORE RIGOROUS METHODOLOGY OR A MORE ELABORATE METHODOLOGY, THE DEFENSE'S ARGUMENTS ESSENTIALLY PENALIZE, OR SEEK TO PENALIZE THESE EXPERT OPINIONS FOR BEING SIMPLE.

BUT SIMPLICITY SHOULD BE A GOOD THING HERE. COMPLEXITY IS NOT A REQUIREMENT FOR RELIABILITY OR ADMISSIBILITY WHEN IT COMES TO EXPERT OPINIONS. IT'S OKAY THAT THESE OPINIONS ARE

02:27PM 1 RELATIVELY SIMPLE ONES.

02:27PM 2 AND THE GOVERNMENT CITES ADAMS VERSUS LABCORP, THAT'S AN  
02:27PM 3 ELEVENTH CIRCUIT CASE WHERE THE COURT THERE SAID THAT AN  
02:27PM 4 EXPERT'S METHODOLOGY CAN CONSIST OF THE APPLICATION OF MEDICAL  
02:27PM 5 KNOWLEDGE, AND WHETHER THAT EXPERT'S APPROACH IS CALLED A,  
02:27PM 6 QUOTE, METHODOLOGY OR SIMPLY, QUOTE, APPLICATION OF  
02:27PM 7 PROFESSIONAL JUDGMENT DOES NOT MATTER AS LONG AS THERE'S AN  
02:28PM 8 APPROPRIATE RELIABILITY INQUIRY.

02:28PM 9 SO HERE AGAIN THE QUALIFICATIONS OF THESE EXPERTS, THE  
02:28PM 10 FACT THAT WE'RE SIMPLY ASKING THEM TO OPINE IN A WAY THAT THEY  
02:28PM 11 DO LITERALLY EVERY DAY AS PART OF TREATING PATIENTS, THOSE  
02:28PM 12 FACTS RENDER THEIR OPINIONS ADMISSIBLE AND RELIABLE AND THERE  
02:28PM 13 SHOULD NOT BE ANY NEED TO HAVE A DAUBERT HEARING TO CONFIRM  
02:28PM 14 THAT.

02:28PM 15 IMAGINE -- HERE'S A POSSIBLY HELPFUL ANALOGY. IMAGINE  
02:28PM 16 THAT THIS CASE, INSTEAD OF TURNING ON THE ACCURACY OF BLOOD  
02:28PM 17 TESTS, TURNED ON THE ACCURACY OF AN ELECTRONIC SCALE. YOU CAN  
02:28PM 18 IMAGINE A FAMILY PHYSICIAN, WHO CONSTANTLY DOES HEALTH CHECKS  
02:28PM 19 AND WEIGHS PEOPLE FREQUENTLY, WOULD HAVE A PRETTY GOOD SENSE OF  
02:28PM 20 WHAT A PATIENT'S WEIGHT IS LIKELY TO BE, WHAT THE REALISTIC  
02:28PM 21 RANGE IS GOING TO BE, AND IF A PATIENT COMES INTO THE OFFICE  
02:28PM 22 ONE DAY WHO HAS WEIGHED, LET'S SAY, 180 POUNDS IN THE PAST, IF  
02:29PM 23 THE DOCTOR HAS A SENSE OF THAT PATIENT'S OVERALL HEALTH, MUSCLE  
02:29PM 24 TONE, HEIGHT, THAT OTHER INFORMATION, IF THAT PATIENT STEPS ON  
02:29PM 25 AN ELECTRONIC SCALE AND THE SCALE READS 40 POUNDS INSTEAD OF

02:29PM 1 180, THAT DOCTOR IS IN A VERY GOOD POSITION TO SAY THIS RESULT  
02:29PM 2 DOESN'T MATCH UP. THIS SCALE CANNOT BE ACCURATE BASED ON MY  
02:29PM 3 EXPERIENCE, BASED ON THE SIMPLE FACT THAT I KNOW THERE IS  
02:29PM 4 SOMETHING WRONG WITH THIS RESULT. IT CANNOT BE TRUE.

02:29PM 5 THAT'S THE EXACT SAME THING THAT IS HAPPENING HERE. JUST  
02:29PM 6 LIKE IN THAT CASE, YOU KNOW, IF THIS WERE ABOUT ELECTRONIC  
02:29PM 7 SCALES, WE WOULDN'T BE ASKING THE DOCTORS TO EXPLAIN WHAT WENT  
02:29PM 8 WRONG IN THE CIRCUITRY OF THE SCALE. WE'RE NOT ASKING THEM TO  
02:29PM 9 PROVIDE THAT EXPLANATION. WE'RE NOT ASKING THEM TO MAKE  
02:29PM 10 SWEEPING CONCLUSIONS ABOUT WHAT MUST BE WRONG WITH OTHER SCALES  
02:29PM 11 MADE BY THAT SAME COMPANY.

02:29PM 12 BUT THEY CAN SAY, I GOT THIS RESULT, IT DOESN'T MAKE SENSE  
02:29PM 13 BASED ON EVERYTHING ELSE I KNOW.

02:29PM 14 IN THAT CASE ALSO, IT'S HARD TO IMAGINE HOW THERE COULD BE  
02:30PM 15 A COMPLICATED, ELABORATE MULTI-STEP METHODOLOGY UNDERLYING THAT  
02:30PM 16 OPINION, BUT THAT DOESN'T MEAN IT'S NOT RELIABLE, AND THAT'S  
02:30PM 17 SIMPLY THE GOVERNMENT'S POINT.

02:30PM 18 LET ME COVER THE FOUR CATEGORIES OF OPINIONS THAT THE  
02:30PM 19 DEFENSE IS OBJECTING TO.

02:30PM 20 FIRST, AS TO OPINIONS BASED ON PATIENTS WHO HAVE NOT YET  
02:30PM 21 BEEN IDENTIFIED, THE GOVERNMENT'S PLAN IS TO IDENTIFY THOSE  
02:30PM 22 PATIENTS IF AT ALL POSSIBLE, AND SO THAT IS THE CONTINUING WORK  
02:30PM 23 OF THE GOVERNMENT. IN SOME CASES IT INVOLVES RETRIEVING LARGE  
02:30PM 24 QUANTITIES OF RECORDS FROM THE DOCTOR'S OFFICE AND REVIEWING  
02:30PM 25 THOSE RECORDS THOROUGHLY TO ASSIST THE DOCTOR IN IDENTIFYING

02:30PM 1 THOSE PATIENTS.

02:30PM 2 IN OTHER CASES IT INVOLVES WORKING WITH THE DOCTOR AND  
02:30PM 3 SEEKING THAT INFORMATION SO THAT THE DOCTOR CAN ACTUALLY GO  
02:30PM 4 THROUGH AND -- GO BACK THROUGH HIS OR HER RECORDS AND PROVIDE  
02:30PM 5 THAT INFORMATION TO THE GOVERNMENT.

02:30PM 6 SO THOSE EFFORTS ARE ONGOING.

02:30PM 7 THE PLAN IS TO -- OR THE GOVERNMENT'S INTENTION IS TO HAVE  
02:31PM 8 DOCTORS TESTIFY BASED ON SPECIFIC PATIENTS THAT THEY CAN  
02:31PM 9 IDENTIFY FOR THE DEFENSE.

02:31PM 10 IN THE ABSENCE OF THAT, WE'LL NEED TO THINK ABOUT WHETHER  
02:31PM 11 ENOUGH DETAIL CAN BE PROVIDED SEPARATE FROM THE PATIENT'S  
02:31PM 12 IDENTITY THAT A SHOWING CAN STILL BE MADE FOR THAT OPINION AS  
02:31PM 13 RELIABLE, BUT WE'RE NOT THERE YET. PLAN A IS STILL TO ACTUALLY  
02:31PM 14 DETERMINE AND DISCLOSE THOSE IDENTITIES.

02:31PM 15 THE NEXT CATEGORY RELATES TO OPINIONS REGARDING THE  
02:31PM 16 ABSENCE OF PROBLEMS WITH OTHER LAB SERVICES.

02:31PM 17 HERE I HEAR TWO DIFFERENT THINGS FROM THE DEFENSE. ON THE  
02:31PM 18 ONE HAND I HEAR THAT THIS CASE CAN'T BE PROVEN WITHOUT A  
02:31PM 19 DETERMINATION OF THERANOS'S OVERALL FAILURE RATE, AND IF THAT  
02:31PM 20 OVERALL FAILURE RATE IS SIMILAR TO WHAT THE DEFENSE REPRESENTS  
02:31PM 21 IS THE GENERAL FAILURE RATE IN LAB TESTING, THEN IT CAN'T BE  
02:32PM 22 SAID THAT THERANOS'S TESTS WERE INACCURATE.

02:32PM 23 THE GOVERNMENT DISAGREES WITH THAT READING OF THE CASE.  
02:32PM 24 THAT'S NOT HOW THIS WIRE FRAUD CASE WORKS.

02:32PM 25 BUT, ON THE OTHER HAND, THE DEFENSE IS NOW SAYING THAT THE



02:32PM 1 RELATIVE PERFORMANCE OF OTHER LABS MAKES NO DIFFERENCE TO THIS  
02:32PM 2 CASE AND THAT DOCTORS SHOULDN'T BE ALLOWED TO SAY, I  
02:32PM 3 EXPERIENCED THESE PROBLEMS WITH THERANOS TESTS, I NEVER  
02:32PM 4 ENCOUNTERED SIMILAR PROBLEMS WITH OTHER LAB SERVICES.

02:32PM 5 BUT THOSE STATEMENTS BY DOCTORS, THOSE OPINIONS ARE  
02:32PM 6 IMPORTANT BECAUSE THEY DO SHOW THE FACT, THEY TEND TO SHOW THAT  
02:32PM 7 THE ACCURACY AND RELIABILITY PROBLEMS EXPERIENCE BY THERANOS  
02:32PM 8 WERE UNIQUE TO THAT COMPANY.

02:32PM 9 THIS IS NOT GOING TO BE THE ONLY EVIDENCE BY A LONG SHOT  
02:32PM 10 THAT SHOWS THAT. AS I REFERENCED BEFORE, THERE WILL BE  
02:32PM 11 INTERNAL EMPLOYEE COMMUNICATIONS REGARDING THERANOS SPECIFIC  
02:32PM 12 ISSUES. THERE WILL BE REGULATORY REPORTS SHOWING THE  
02:32PM 13 DEFICIENCIES IN THE THERANOS LABS.

02:33PM 14 SO IT WILL BE VERY CLEAR AT THE END OF THE TRIAL THAT  
02:33PM 15 THERANOS SUFFERED FROM MANY OF ITS OWN UNIQUE PROBLEMS THAT  
02:33PM 16 CREATED AN INABILITY TO DELIVER RELIABLE TEST RESULTS.

02:33PM 17 BUT DOCTORS' STATEMENTS ARE CERTAINLY PART OF THAT. WHEN  
02:33PM 18 THEY OPINE THAT A SPECIFIC TEST RESULT IS INACCURATE, OR MUST  
02:33PM 19 HAVE BEEN INACCURATE, I THINK IT WILL BE CLEAR THAT THESE  
02:33PM 20 SITUATIONS, THESE INSTANCES MADE QUITE AN IMPACT ON THESE  
02:33PM 21 DOCTORS.

02:33PM 22 IN ORDER FOR THEM TO SAY THAT A TEST RESULT MUST BE  
02:33PM 23 INACCURATE, THE RESULT MUST BE SO FAR OUT OF THE RANGE OF WHAT  
02:33PM 24 THEY WERE EXPECTING THAT IT'S OBVIOUS. OTHERWISE THEY WOULDN'T  
02:33PM 25 BE COMFORTABLE MAKING THAT STATEMENT.

02:33PM 1 SO WHEN THEY SAY IN TURN THAT I NEVER ENCOUNTERED ANYTHING  
02:33PM 2 LIKE THIS WORKING WITH OTHER LABS FOR THE PAST 10 YEARS,  
02:33PM 3 20 YEARS, HOWEVER LONG IT IS, I THINK THE COURT AND THE JURY  
02:33PM 4 CAN RELY ON THAT STATEMENT OF THEIR MEMORY.

02:34PM 5 AGAIN, THAT'S NOT NECESSARILY AN OPINION. THAT IS SIMPLY  
02:34PM 6 A STATEMENT OF THEIR RECOLLECTION SAYING THAT THEY DON'T RECALL  
02:34PM 7 HAVING THESE PROBLEMS WITH OTHER LABS BECAUSE THESE ISSUES  
02:34PM 8 STAND OUT IN THE DOCTORS' MINDS.

02:34PM 9 THE COURT: SO THAT WOULD BE THE REASON -- THE  
02:34PM 10 TESTIMONY WOULD BE, HOW DO YOU REMEMBER THIS, AND THE ANSWER  
02:34PM 11 WOULD BE, BECAUSE I'VE NEVER HAD AN ISSUE WITH A LAB BEFORE?

02:34PM 12 MR. BOSTIC: YES, YES, YOUR HONOR.

02:34PM 13 AND IF THE FOLLOW-UP QUESTION WAS, WELL, HOW CAN YOU BE  
02:34PM 14 SURE? WOULD YOU REMEMBER THIS KIND OF ISSUE COMING UP BEFORE?

02:34PM 15 I ANTICIPATE THE RESPONSE WOULD BE: YES, CERTAINLY. THIS  
02:34PM 16 WAS SUCH A UNIQUE AND DRAMATICALLY WRONG RESULT THAT IT'S GOING  
02:34PM 17 TO STAND OUT IN MY MIND GOING FORWARD. ANYTHING SIMILAR WOULD  
02:34PM 18 HAVE SIMILARLY STOOD OUT IN MY MIND.

02:34PM 19 SO IF THE QUESTION FROM THE DEFENSE IS, HAVE THESE DOCTORS  
02:34PM 20 GONE BACK AND AUDITED EACH OF THEIR 5,000, 10,000 ASSAY RESULTS  
02:34PM 21 OBTAINED FROM CONVENTIONAL LABS OVER DECADES TO REACH THAT  
02:35PM 22 OPINION, THE ANSWER IS NO.

02:35PM 23 BUT THEIR TESTIMONY WILL BE HONEST IN THAT THEY'RE SIMPLY  
02:35PM 24 TESTIFYING THAT, TO THEIR RECOLLECTION, THEY HAVE NOT SEEN  
02:35PM 25 THESE ISSUES WITH OTHER LABS BEFORE.

02:35PM 1 THE COURT: SO IS THE QUESTION, PHRASED EQUALLY,  
02:35PM 2 HAVE YOU EVER HAD A PATIENT TEST RESULT COME BACK WITH THIS  
02:35PM 3 TYPE OF VARIANCE, OR WHATEVER IT IS, INACCURACY? IS THAT THE  
02:35PM 4 SAME QUESTION?

02:35PM 5 MR. BOSTIC: I BELIEVE IT'S EQUIVALENT, YOUR HONOR.

02:35PM 6 THE COURT: AND THEN THE QUESTION IS -- WELL, I SEE  
02:35PM 7 THE ISSUE OF I'VE NEVER SEEN THIS BEFORE; AND THEN THE  
02:35PM 8 QUESTIONS OF, WELL, HOW MANY LABS HAVE YOU USED? WELL, I'VE  
02:35PM 9 ONLY USED QUEST, OR WHATEVER IT IS. AND THAT HAS SOME VALUE, I  
02:35PM 10 SUPPOSE. OR, I'VE USED 50 DIFFERENT LABS. I SUPPOSE THAT HAS  
02:35PM 11 DIFFERENT VALUE.

02:36PM 12 I WAS JUST CURIOUS IF THE ISSUE REALLY WAS, HAVE YOU EVER  
02:36PM 13 HAD A PATIENT TEST WITH THIS RANGE, THIS VARIANCE THAT'S  
02:36PM 14 NONBIOLOGICAL, THAT HAS NO BIOLOGICALLY SOUND EXPLANATION OR  
02:36PM 15 SOMETHING LIKE THAT.

02:36PM 16 MR. BOSTIC: THE COURT'S QUESTION IS WHETHER IT  
02:36PM 17 MATTERS HOW MANY LABS THE GIVEN DOCTOR HAS PATRONIZED?

02:36PM 18 THE COURT: WELL, I THINK SO.

02:36PM 19 WHAT I HEAR MS. TREFZ SAYING IS THAT THERE NEEDS TO BE  
02:36PM 20 DAUBERTS ON ALL OF THESE THINGS, AND BEFORE YOU CAN EVEN LET  
02:36PM 21 THOSE IN, JUDGE, YOU NEED TO ASK THESE TYPES OF QUESTIONS, WHAT  
02:36PM 22 IS THE OPINION BASED ON?

02:36PM 23 AS OPPOSED TO JUST ASKING THEM AS NOT SO MUCH OF AN  
02:36PM 24 EXPERT, I SUPPOSE, BUT JUST AS A FACT WITNESS ON THEIR PRACTICE  
02:36PM 25 20 YEARS, 30 YEARS, 10 YEARS, 5 YEARS, IN ALL OF THAT, HOW MANY

TESTS HAVE YOU SENT OUT AND HAVE YOU EVER HAD TESTS THAT ARE ANOMALIES LIKE THIS BEFORE OR RECEIVED THAT?

I DON'T KNOW. I'M NOT TRYING TO FASHION A QUESTION. I'M JUST TRYING TO GET AN IDEA, IS A DAUBERT REALLY NEEDED FOR THESE IF THERE ARE OTHER QUESTIONS THAT CAN BE POSED AND ANSWERED WITH THE SAME QUESTION AND PROVIDE THAT INFORMATION?

MR. BOSTIC: I DON'T BELIEVE A DAUBERT IS NECESSARY. THE CASE LAW IS CLEAR THAT IT'S NOT REQUIRED AS AN AUTOMATIC MATTER OF COURSE.

AND HERE I THINK, AGAIN, THE SIMPLICITY OF THE OPINIONS IS THE KEY. THE SIMPLICITY OF THE OPINIONS SHOULD MAKE THEM EASIER TO DEFEND, EASIER FOR THE DEFENSE TO UNDERSTAND AND TO PREPARE FOR. IT MAKES IT EASIER FOR THEM TO CONFRONT THEM, FRANKLY.

AND SO I'M NOT SURE WHAT WOULD BE ACCOMPLISHED BY A DAUBERT HEARING.

AS TO THIS SPECIFIC CATEGORY OF STATEMENT, A DOCTOR SAYING THAT THEY HAVEN'T ENCOUNTERED THIS KIND OF ISSUE BEFORE, I DON'T VIEW THAT AS A SEPARATE OPINION FROM THEIR CORE OPINION ABOUT A SPECIFIC INACCURATE THERANOS TEST RESULT.

ONCE THEY OPINE THAT GIVEN A THERANOS TEST RESULT SET OFF ALARM BELLS, IF YOU WILL, THE NEXT QUESTION IS SIMPLY, HAS THAT ALARM EVER GONE OFF BEFORE? HAVE YOU EVER SEEN A SET OF CONDITIONS THAT SIMILARLY CAUSED YOU TO REACT WITH THE CONCLUSION THAT A TEST RESULT MUST BE SIMILARLY INACCURATE?

02:38PM 1 SO IT'S DEFINED TO THAT DOCTOR'S RECOLLECTION, TO HIS OR  
02:38PM 2 HER EXPERIENCE, AND IT'S NOT AN INDEPENDENT OPINION THAT WOULD  
02:38PM 3 REQUIRE A SEPARATE BASIS.

02:38PM 4 THE NEXT CATEGORY RELATES TO HYPOTHETICAL CONSEQUENCES OF  
02:38PM 5 INACCURATE TEST RESULTS. I THINK THIS IS PART AND PARCEL OF  
02:38PM 6 THE CONTEXTUAL AND BACKGROUND TESTIMONY THAT THESE DOCTORS ARE  
02:38PM 7 EXPECTED TO GIVE AND SHOULD BE PERMITTED TO GIVE.

02:38PM 8 WHEN A DOCTOR IS EXPLAINING WHAT AN ASSAY IS, HOW IT'S  
02:39PM 9 USED, WHY IT'S IMPORTANT, I THINK IT'S CRITICAL THAT THE DOCTOR  
02:39PM 10 BE ALLOWED TO EXPLAIN WHY ACCURACY IS IMPORTANT FOR A GIVEN  
02:39PM 11 ASSAY, AND THAT NECESSARILY MUST INCLUDE HOW THE DOCTOR  
02:39PM 12 INTERPRETS AND WOULD RESPOND TO OUT OF RANGE OR RED FLAG  
02:39PM 13 RESULTS. SO IT'S AS SIMPLE AS THAT.

02:39PM 14 WHEN A DOCTOR IS EXPLAINING HOW HE OR SHE INTERPRETS HCG  
02:39PM 15 RESULTS, FOR EXAMPLE, YOU WOULD EXPECT THE DOCTOR TO SAY IF A  
02:39PM 16 RESULT IS THIS FAR OUT OF RANGE IN THIS DIRECTION, I MIGHT  
02:39PM 17 RESPOND IN THE FOLLOWING WAY: IT WOULD BE A MEDICAL EMERGENCY,  
02:39PM 18 THIS STEP WOULD THEN BE NECESSARY.

02:39PM 19 OF COURSE IF THE TEST RESULT WAS INACCURATE, THERE'S A  
02:39PM 20 RISK THAT STEPS WOULD BE TAKEN UNNECESSARILY. THAT DOESN'T  
02:39PM 21 SEEM CONTROVERSIAL.

02:39PM 22 IT WOULD BE INTRODUCED ONLY TO PROVIDE FURTHER CONTEXT AND  
02:39PM 23 BACKGROUND FOR THE JURY, AND ALSO TO SHOW THE MATERIALITY OF  
02:40PM 24 ACCURACY REPRESENTATIONS IN THIS CASE.

02:40PM 25 WHEN IT COMES TO THE BUSINESS OF OFFERING CLINICAL BLOOD

02:40PM 1 TESTING, REQUIREMENTS FOR ACCURACY COME WITH THE TERRITORY AND  
02:40PM 2 THE DOCTOR TESTIMONY WILL BE PART OF THE SHOWING THAT THE VALUE  
02:40PM 3 OF THESE TESTS LIES IN THEIR ACCURACY.

02:40PM 4 SO WHEN THERANOS OFFERED TESTS REPRESENTING THEM TO BE  
02:40PM 5 ACCURATE, BUT THEY HAD ACCURACY AND RELIABILITY PROBLEMS,  
02:40PM 6 VICTIMS, PATIENT VICTIMS DIDN'T GET THE BENEFIT OF THE BARGAIN  
02:40PM 7 BECAUSE IF THE ACCURACY IS MISSING, THE VALUE OF THE TEST IS  
02:40PM 8 GREATLY DIMINISHED, IF NOT ELIMINATED, AND THE DOCTOR TESTIMONY  
02:40PM 9 WILL EXPLAIN WHY THAT'S THE CASE FOR INDIVIDUAL ASSAYS.

02:40PM 10 AS TO PATIENT ACCOUNTS REGARDING RISKS OR IMPACTS OF  
02:40PM 11 INACCURATE THERANOS RESULTS, WITH THE COURT'S PERMISSION, I'LL  
02:41PM 12 DEFER TO MY COLLEAGUE WHO IS GOING TO ARGUE THAT SEPARATE  
02:41PM 13 MOTION.

02:41PM 14 AND THAT BRINGS ME I THINK TO THE FOURTH CATEGORY, WHICH  
02:41PM 15 IS, I THINK, JUST A REHASHING OF THE DEFENDANT'S REQUEST THAT  
02:41PM 16 THE COURT EXCLUDE PATIENT TESTIMONY BASED ON INDIVIDUAL PATIENT  
02:41PM 17 RESULTS.

02:41PM 18 AS WITH THAT MOTION, THE EXISTENCE OF INACCURATE THERANOS  
02:41PM 19 TESTS IS RELEVANT. THESE ARE, AGAIN, BRICKS IN THE WALL OF THE  
02:41PM 20 GOVERNMENT'S CASE REGARDING THE ACCURACY AND RELIABILITY  
02:41PM 21 PROBLEMS WITH THERANOS. THEY ARE CERTAINLY NOT THE ONLY PIECES  
02:41PM 22 OF EVIDENCE THAT THE GOVERNMENT WILL OFFER, BUT ONCE THE  
02:41PM 23 EVIDENCE HAS ESTABLISHED -- OR BECAUSE THE EVIDENCE IS GOING TO  
02:41PM 24 ESTABLISH THAT THERANOS HAD THESE REPEATED PROBLEMS ACROSS  
02:41PM 25 SEVERAL OF ITS TESTS WITH ACCURACY AND RELIABILITY, THE

02:42PM 1 EXISTENCE AND RECEIPT OF THOSE BAD TEST RESULTS BY PATIENTS AND  
02:42PM 2 THOSE DOCTORS BECOMES RELEVANT AND WILL BE A RELEVANT PART OF  
02:42PM 3 THE PROOF AT TRIAL.

02:42PM 4 THE COURT: OKAY. THANK YOU VERY MUCH.

02:42PM 5 MS. TREFZ, ANYTHING IN CLOSING?

02:42PM 6 MS. TREFZ: YOUR HONOR, I'LL BE EXTREMELY BRIEF.  
02:42PM 7 THREE QUICK POINTS, YOUR HONOR.

02:42PM 8 THE FIRST IS THAT I JUST WANTED TO MAKE CLEAR THAT WE ARE  
02:42PM 9 NOT SAYING THAT PAYING THERANOS CUSTOMERS AND DOCTORS CAN'T  
02:42PM 10 TESTIFY AT ALL. I WOULD JUST -- I WANT TO -- I DON'T WANT THE  
02:42PM 11 MISIMPRESSION TO BE LEFT THAT WE'RE SOMEHOW MOVING TO EXCLUDE  
02:42PM 12 ALL DOCTOR TESTIMONY OR ALL PAYING PATIENT TESTIMONY. THERE  
02:42PM 13 ARE THINGS THAT WE THINK THAT THEY COULD SAY.

02:42PM 14 WHAT WE'RE CHALLENGING ARE VERY SPECIFIC DISCLOSURES THAT  
02:42PM 15 HAVE BEEN MADE AND VERY -- AND IN THE NEXT MOTION VERY SPECIFIC  
02:43PM 16 POTENTIAL PARTS OF THEIR TESTIMONY.

02:43PM 17 SECOND, THE FACT THAT IT'S A SIMPLE OPINION DOESN'T MEAN  
02:43PM 18 THAT IT CAN -- THAT IT DOESN'T NEED TO SATISFY 702. IT STILL  
02:43PM 19 NEEDS TO BE RELIABLE.

02:43PM 20 AND I JUST NOTE THAT THE IDEA THAT A DOCTOR COULD GET UP  
02:43PM 21 AND SAY I'VE NEVER EXPERIENCED CLINICAL ERRORS BEFORE MAY BE  
02:43PM 22 SIMPLE TESTIMONY, BUT IT'S EXTREMELY SWEEPING AND EXTREMELY  
02:43PM 23 PREJUDICIAL AND OF LIMITED PROBATIVE VALUE IN THIS CASE.

02:43PM 24 WITH RESPECT TO THE HYPOTHETICAL CONSEQUENCES, LET'S TALK  
02:43PM 25 ABOUT THAT NEXT SO THAT WE CAN MOVE ON.

02:43PM 1 BUT THOSE ARE THE ONLY POINTS I WANTED TO MAKE. THANKS.

02:43PM 2 THE COURT: OKAY. THANK YOU.

02:43PM 3 DO YOU HAVE 562?

02:43PM 4 MS. TREFZ: YES. GIVE ME A SECOND AND I WILL BE  
02:44PM 5 BACK.

02:44PM 6 THE COURT: IT'S ABOUT AN HOUR SINCE OUR LAST  
02:44PM 7 RECESS.

02:44PM 8 SHOULD WE PRESS ON? DOES ANYBODY NEED A BREAK? ANYBODY  
02:44PM 9 NEED A BREAK?

02:44PM 10 MS. SAHARIA: WE'RE OKAY, YOUR HONOR.

02:44PM 11 THE COURT: ALL RIGHT. LET'S PRESS ON. THANK YOU.

02:44PM 12 MS. TREFZ: ALL RIGHT. I BELIEVE WE'RE NOW AT 562.  
02:44PM 13 AM I CORRECT?

02:44PM 14 THE COURT: THAT'S WHAT MY NOTES SAY.

02:44PM 15 MS. TREFZ: SO AS WE HAVE SORT OF BEEN TALKING ABOUT  
02:44PM 16 HERE, THIS MOTION ALSO DEALS WITH SOME OF THE SPECIFIC CUSTOMER  
02:44PM 17 STORIES AND PATIENT STORIES, BUT IT FOCUSSES ON A VERY SPECIFIC  
02:44PM 18 PART OF THEM.

02:44PM 19 AND IN PARTICULAR, IT APPEARS, BASED ON EVERYTHING THAT WE  
02:44PM 20 HAVE RECEIVED, DISCLOSURES, DISCOVERY, AND PLEADINGS, THAT THE  
02:45PM 21 GOVERNMENT SEEKS TO INTRODUCE AT TRIAL EVIDENCE REGARDING, ONE,  
02:45PM 22 COLLATERAL EMOTIONAL EFFECTS SUFFERED BY THERANOS CUSTOMERS WHO  
02:45PM 23 BELIEVE THAT THEY RECEIVED AN ERRANT RESULTS; OR, TWO,  
02:45PM 24 HYPOTHETICAL POTENTIAL PHYSICAL CONSEQUENCES OF AN ERRANT TEST  
02:45PM 25 THAT SIMPLY DID NOT OCCUR HERE.



02:45PM 1 AS I JUST MENTIONED A MOMENT AGO, WE'RE NOT LOOKING TO CUT  
02:45PM 2 OUT ALL CUSTOMER TESTIMONY. THIS IS NOT A MATTER OF EXCLUDING  
02:45PM 3 THE VICTIMS, AS THE GOVERNMENT CALLS THEM, FROM THIS CASE.

02:45PM 4 WHAT IT IS, IT IS AIMED AT FOCUSING ON THE ISSUE AND, IN  
02:45PM 5 PARTICULAR, THE WIRE FRAUD HARM THAT IS AT ISSUE HERE.

02:45PM 6 MR. BOSTIC HAS SAID MULTIPLE TIMES THAT THIS IS NOT A  
02:45PM 7 PRODUCTS LIABILITY CASE. HE SAYS IT'S A WIRE FRAUD CASE.

02:45PM 8 THE HARM FROM A WIRE FRAUD CASE IS FINANCIAL HARM, AND IN  
02:46PM 9 THIS CASE THE HARM FROM THE ALLEGED WIRE FRAUD CASE IS THE  
02:46PM 10 MONEY THAT THE PATIENT PAID FOR THE TEST.

02:46PM 11 SO ADDITIONAL CONSEQUENCES, WHETHER THEY BE EMOTIONAL OR,  
02:46PM 12 AS IS THE CASE IN SOME OF THE TESTIMONY, HYPOTHETICAL PHYSICAL  
02:46PM 13 CONSEQUENCES THAT SOMEBODY FEARED COULD HAPPEN, IT'S NOT  
02:46PM 14 RELEVANT TO THE CASE THE GOVERNMENT CHOSE TO CHARGE.

02:46PM 15 WHAT I REALLY WANTED TO FOCUS ON, YOUR HONOR, IS THE  
02:46PM 16 POTENTIAL PREJUDICE THAT COMES FROM THIS EVIDENCE, AND EARLIER  
02:46PM 17 TODAY MR. BOSTIC FOCUSED ON -- HE SAID, WE'RE NOT LOOKING TO  
02:46PM 18 JUST INFLAME THE JURY. LOOK AT THE WITNESSES THAT WE HAVE  
02:46PM 19 CHOSEN TO PUT ON OUR LIST. HERE'S ONE EXAMPLE OF THIS ONE  
02:46PM 20 PATIENT WHO SAYS THAT HE WASN'T REALLY WORRIED ABOUT HIS  
02:46PM 21 RESULT.

02:47PM 22 BUT I THINK WE ULTIMATELY NEED ONLY READ THE INTRODUCTION  
02:47PM 23 TO THE GOVERNMENT'S BRIEF IN ITS OPPOSITION TO OUR MOTION HERE  
02:47PM 24 TO UNDERSTAND THE INFLAMMATORY PURPOSE OF THIS EVIDENCE. THIS  
02:47PM 25 BRIEF IS FULL OF INDIGNATION AND FURY, BUT IT'S WORTH NOTING

02:47PM 1 THAT THE GOVERNMENT IS TAKING SUBSTANTIAL LIBERTIES WITH  
02:47PM 2 RESPECT TO THE EXAMPLES THAT IT PRESENTS IN THIS BRIEF.

02:47PM 3 IN PARTICULAR, THERE'S ONE POINT THAT WE WERE NOT ABLE TO  
02:47PM 4 ADDRESS IN OUR REPLY BECAUSE WE ONLY RECEIVED THE DISCOVERY  
02:47PM 5 AFTER THE REPLY WAS FILED IN MARCH, BUT WE RECEIVED THE  
02:47PM 6 DISCOVERY AT THE END OF MARCH.

02:47PM 7 BUT I THINK IT REALLY ILLUMINATES THE PURPOSE OF THIS  
02:47PM 8 EVIDENCE AND I WANT TO ENSURE THAT THE COURT IS NOT LEFT WITH  
02:47PM 9 AN IMPRESSION AS TO, YOU KNOW, THERE WERE THERANOS TESTS THAT  
02:47PM 10 WERE THIS CLOSE TO CAUSING SUBSTANTIAL PATIENT HARM, BUT BY THE  
02:48PM 11 GRACE OF GOOD MEDICAL CARE, THEY SOMEHOW AVOIDED IT.

02:48PM 12 IN PARTICULAR, THE GOVERNMENT USES AN EXAMPLE ABOUT AN  
02:48PM 13 ECTOPIC PREGNANCY, AND THIS EXAMPLE IS ON PAGE 5 OF THEIR BRIEF  
02:48PM 14 STARTING AT LINE 3. THE GOVERNMENT SAYS ANOTHER PATIENT  
02:48PM 15 RECEIVED A THERANOS TEST RESULT INDICATING SHE WAS NOT  
02:48PM 16 PREGNANT. IN REALITY, SHE WAS CURRENTLY EXPERIENCING AN  
02:48PM 17 ECTOPIC PREGNANCY THAT WOULD HAVE THREATENED HER LIFE HAD A  
02:48PM 18 TEST FROM ANOTHER LAB NOT REVEALED ITS PRESENCE.

02:48PM 19 THAT BRIEF WAS FILED ON JANUARY 8TH, 2021. BUT TWO MONTHS  
02:48PM 20 EARLIER, THE PATIENT'S DOCTOR TOLD THE GOVERNMENT SOMETHING  
02:48PM 21 VERY DIFFERENT. WHAT THE PATIENT'S DOCTOR TOLD THE  
02:48PM 22 GOVERNMENT -- THIS IS IN THE INTERVIEW MEMORANDUM WHICH I'M  
02:48PM 23 HAPPY TO SUBMIT IF IT'S NECESSARY -- BUT JUST FOR THE PURPOSE  
02:49PM 24 OF MOVING US ALONG HERE, IT MAKES CLEAR THAT THE DOCTOR  
02:49PM 25 EXPECTED AN ECTOPIC PREGNANCY AS A RESULT OF THE THERANOS TEST

02:49PM 1 AND NOT IN SPITE OF IT AS THE GOVERNMENT SUGGESTS.

02:49PM 2 IT MAKES CLEAR THAT A THERANOS TEST INDICATED CORRECTLY  
02:49PM 3 THAT THE DOCTOR'S ATTEMPT TO DISSOLVE THE ECTOPIC PREGNANCY  
02:49PM 4 WITH MEDICATION WAS UNSUCCESSFUL, AND IT MAKES CLEAR THAT THE  
02:49PM 5 DOCTOR IS USED TO ERRATIC HCG READINGS EARLY IN PREGNANCY,  
02:49PM 6 INCLUDING FROM NONTHERANOS LABS THAT HE USES REGULARLY.

02:49PM 7 THE DOCTOR ALSO TOLD THE GOVERNMENT THAT HE THOUGHT MOST  
02:49PM 8 DOCTORS WOULD HAVE ORDERED -- WOULD HAVE DONE WHAT HE DID IN  
02:49PM 9 THIS CASE, WHICH WAS TO ORDER AN ADDITIONAL TEST IF HE HAD A  
02:49PM 10 QUESTION.

02:49PM 11 I POINT THIS OUT, AGAIN, FOR TWO REASONS. ONE, AS I SAID,  
02:49PM 12 I WANT TO BE SURE THAT THE COURT IS NOT LEFT WITH THE  
02:49PM 13 MISIMPRESSION THAT THESE RESULTS WERE VERY CLOSE TO CAUSING  
02:49PM 14 SOME KIND OF DRAMATIC HARM WHEN, IN FACT, THAT IS NOT THE CASE  
02:49PM 15 IN THE VERY VIGNETTE THAT THE GOVERNMENT IS POINTING TO.

02:49PM 16 BUT SECOND, THE DRAMATIC NATURE OF THE GOVERNMENT'S  
02:50PM 17 DESCRIPTION, ESPECIALLY KIND OF IN THE CONTEXT OF THE REST OF  
02:50PM 18 ITS OPPOSITION HERE, REALLY I THINK HIGHLIGHTS AND MAKES CLEAR  
02:50PM 19 THAT THE GOVERNMENT IS SEEKING TO PLAY ON EMOTIONS RATHER THAN  
02:50PM 20 PROVE, YOU KNOW, WITH RELEVANT EVIDENCE THE HARM.

02:50PM 21 THE GOVERNMENT, I THINK, IN ITS ARGUMENT SUGGESTS, WELL,  
02:50PM 22 HARM IS SOMETIMES USED TO PROVE INTENT OR IT'S USED TO PROVE,  
02:50PM 23 YOU KNOW, ONE OF THESE OTHER THINGS.

02:50PM 24 BUT, AGAIN, THOSE CASES ARE LIMITED TO WIRE FRAUD HARM,  
02:50PM 25 AND THERE IS A WHOLE HOST OF CASES THAT WE CITED IN OUR BRIEF

02:50PM 1 AND TO WHICH I WOULD SUBMIT THAT THE GOVERNMENT REALLY HAS NO  
02:50PM 2 GOOD ANSWER THAT KIND OF DRAWS THE LINE AT COLLATERAL  
02:50PM 3 CONSEQUENCES.

02:50PM 4 BECAUSE THE GOVERNMENT CHOSE TO BRING A WIRE FRAUD CASE  
02:50PM 5 HERE, THE WIRE FRAUD HARM IS THE FINANCIAL HARM THAT THE PAYING  
02:50PM 6 PATIENT, YOU KNOW, ALLEGEDLY, YOU KNOW, INCURRED WHEN THEY PAID  
02:50PM 7 FOR THEIR THERANOS TEST. IT'S NOT THE EMOTIONS THAT THEY FELT.

02:51PM 8 AND THEN THE ADDITIONAL KIND OF JUST POINT I WANTED TO  
02:51PM 9 PROVIDE CONTEXT FOR HERE IS EVEN IF PORTIONS OF THIS EVIDENCE  
02:51PM 10 MIGHT BE RELEVANT TO, I'VE HEARD MATERIALITY AS AN EXAMPLE,  
02:51PM 11 EVEN IF PORTIONS OF THIS EVIDENCE MIGHT BE RELEVANT TO  
02:51PM 12 MATERIALITY, EVIDENCE OF A CUSTOMER'S EMOTIONAL RESPONSE AND  
02:51PM 13 THESE HYPOTHETICAL CATASTROPHIC EVENTS THAT DEPEND ON, FRANKLY,  
02:51PM 14 SEVERAL LEVELS OF ADDITIONAL MEDICAL PROCEDURES OR  
02:51PM 15 NONINTERVENTION, I THINK THIS ISN'T THE ONLY WAY FOR THE  
02:51PM 16 GOVERNMENT TO INTRODUCE EVIDENCE OF MATERIALITY AS TO THE  
02:51PM 17 ALLEGED ACCURACY AND RELIABILITY REPRESENTATIONS, THE ALLEGED  
02:51PM 18 MISREPRESENTATIONS.

02:51PM 19 RULE 403 JURIS PRUDENCE AND ALL OF THE WAY FROM OLD CHIEF  
02:52PM 20 DOWN MAKE CLEAR THAT WHEN YOU'RE WEIGHING PROBATIVE VALUE AND  
02:52PM 21 UNDUE PREJUDICE, IT'S APPROPRIATE TO CONSIDER EVIDENTIARY  
02:52PM 22 ALTERNATIVES.

02:52PM 23 AND HERE I THINK THE IDEA THAT, WITH RESPECT TO THE  
02:52PM 24 DOCTORS, ONE EXAMPLE AGAIN IS THE POTENTIAL HYPOTHETICAL  
02:52PM 25 CONSEQUENCES OF -- FROM THE DISCLOSURE RELATED TO DR. ASIN WITH

02:52PM 1 RESPECT TO PSA -- AND THAT'S PROSTATE SPECIFIC ANTIGEN -- AND  
02:52PM 2 THE DISCLOSURE THERE HAS KIND OF A PARADE OF OR A SERIES OF  
02:52PM 3 UNFORTUNATE EVENTS THAT COULD POTENTIALLY LEAD TO HEMORRHAGING  
02:52PM 4 AND SURGERY.

02:52PM 5 BUT IT'S CLEAR FROM THE DESCRIPTION THAT WHAT YOU'RE  
02:52PM 6 TALKING ABOUT IS, OKAY, THE DOCTOR GETS A TEST IT DOESN'T THINK  
02:52PM 7 IS -- OR GETS A TEST THAT IT BELIEVES REQUIRES A BIOPSY AND IT  
02:52PM 8 DOES -- OR SOME OTHER DOCTOR DOES THE BIOPSY AND THE BIOPSY  
02:53PM 9 GOES WRONG, SOMEHOW THAT'S NOT CAUGHT, AND THEN THERE'S  
02:53PM 10 HEMORRHAGING AND SURGERY THAT IS REQUIRED.

02:53PM 11 THAT IS -- THAT IS AN EXTREME CATASTROPHIC, LIKE,  
02:53PM 12 HYPOTHETICAL EXAMPLE THAT NEVER OCCURRED, OR THERE'S NO  
02:53PM 13 EVIDENCE THAT IT EVER OCCURRED HERE AND IT HAS MINIMAL  
02:53PM 14 PROBATIVE VALUE, BUT REALLY BRINGS WITH IT EXTREME PREJUDICE  
02:53PM 15 AND SUGGESTS THAT THERE IS SOME KIND OF INTENSE DANGER THAT  
02:53PM 16 SIMPLY WAS NOT PRESENT HERE.

02:53PM 17 SO THOSE ARE THE POINTS THAT I WANTED TO MAKE WITH RESPECT  
02:53PM 18 TO THIS CASE.

02:53PM 19 AND THEN I GUESS -- SORRY. FINALLY ONE POINT, AND I HEARD  
02:53PM 20 THIS MENTIONED EARLIER. JUST TO BE CLEAR, WE'RE NOT -- WHEN  
02:53PM 21 WE'RE MOVING TO EXCLUDE THESE EMOTIONAL HARMS, WE MEAN NO  
02:53PM 22 DISRESPECT TO CUSTOMERS THAT -- WHO SAY THAT THEY WERE UPSET OR  
02:53PM 23 WORRIED AS A RESULT OF A TEST RESULT.

02:54PM 24 IT'S SIMPLY THAT THOSE FEELINGS AREN'T RELEVANT TO THE  
02:54PM 25 CASE THAT THE GOVERNMENT CHOSE TO CHARGE, AND MS. HOLMES IS

02:54PM 1 ENTITLED TO BE TRIED ON EVIDENCE RELEVANT TO AND NOT UNDULY  
02:54PM 2 PREJUDICIAL TO THE CASE THAT THE GOVERNMENT CHOSE TO CHARGE,  
02:54PM 3 WHICH IS WIRE FRAUD.

02:54PM 4 SO WITH THAT I'LL YIELD THE FLOOR.

02:54PM 5 THE COURT: THANK YOU.

02:54PM 6 MR. SCHENK, YOU'RE SPEAKING TO THIS?

02:54PM 7 MR. SCHENK: YES.

02:54PM 8 THE COURT: AND I HOPE YOU WERE -- I WAS GOING TO  
02:54PM 9 USE THE WORD BENEFITTED -- BUT AT LEAST INFORMED OF THE COURT'S  
02:54PM 10 INITIAL VIEW OF THIS. AND I'M HAPPY TO HEAR FROM YOU.

02:54PM 11 MR. SCHENK: YES. YES, THANK YOU. I APPRECIATE THE  
02:54PM 12 COURT'S INITIAL INTRODUCTORY COMMENTS.

02:54PM 13 OFFERING BLOOD TESTS WHEN YOU KNOW THEY'RE INACCURATE IS  
02:54PM 14 AN EXTREMELY RISKY THING TO DO TO THE PUBLIC. THAT'S WHAT THE  
02:54PM 15 EVIDENCE WILL SHOW OCCURRED IN THIS CASE.

02:54PM 16 THERE IS NO INTRINSIC VALUE TO A BLOOD TEST. NO PERSON  
02:54PM 17 GOES TO GET A BLOOD TEST WITHOUT EXPECTING TO USE THE RESULTS.

02:55PM 18 AND WHEN I SAY "USE," I MEAN THE MATERIALITY OF IT, THE  
02:55PM 19 BENEFIT OF THE BARGAIN.

02:55PM 20 AND IT IS FOR THAT REASON THAT THERE ARE REALLY THREE  
02:55PM 21 BASES THAT I THINK THE COURT SHOULD ADMIT AT LEAST SOME PORTION  
02:55PM 22 OF THIS EVIDENCE.

02:55PM 23 I ACKNOWLEDGE, AND I WANT TO START BY SAYING AT SOME POINT  
02:55PM 24 THERE IS SIGNIFICANT DIMINISHING RETURNS TO HOW LONG YOU ALLOW  
02:55PM 25 A PATIENT TO TELL THE STORY OF THEIR WORRIES AND THEIR FEARS

02:55PM 1 AND THE WHAT ELSE. I ACKNOWLEDGE THAT. AT SOME 403 STEPS IN  
02:55PM 2 AND THE TESTIMONY SHOULD NOT CONTINUE.

02:55PM 3 BUT IT DOESN'T MEAN THAT YOU DON'T BEGIN DOWN THE ROAD,  
02:55PM 4 AND THE REASON YOU BEGIN DOWN THE ROAD IS FOR THREE THINGS.

02:55PM 5 NOW, THE FIRST IS THAT THE GOVERNMENT HAS THE RIGHT TO  
02:55PM 6 PROVE THAT THE PATIENTS DID NOT RECEIVE THE BENEFIT OF THE  
02:55PM 7 BARGAIN. IN OTHER WORDS, THEY WENT INTO AN EXCHANGE WITH  
02:55PM 8 THERANOS EXPECTING TO GET A BLOOD TEST THAT THEY COULD THEN  
02:55PM 9 MAKE OR GIVE TO A DOCTOR TO MAKE MEDICAL DECISIONS BASED UPON.

02:56PM 10 AND WHEN A PATIENT TAKES THE STAND AND TELLS THE STORY OF  
02:56PM 11 WHAT RESULT THEY GOT AND THEN WHAT THEY DID WITH THAT RESULT,  
02:56PM 12 TOOK IT TO THEIR DOCTOR AND THEN WENT AND GOT A SECOND TEST,  
02:56PM 13 AND THE SECOND TEST SAID SOMETHING DIFFERENT AND THEY ENDED UP  
02:56PM 14 FOLLOWING THE MEDICAL ADVICE WITH THE SECOND AND NOT THE FIRST  
02:56PM 15 TEST, THAT IS HELPFUL BACKGROUND TO EXPLAIN WHY THE PATIENT  
02:56PM 16 DIDN'T GET THE BENEFIT OF THE BARGAIN, WHY THEY FELT THAT WHAT  
02:56PM 17 THEY EXPECTED TO GET WAS DIFFERENT FROM WHAT THEY ACTUALLY GOT.

02:56PM 18 THE SECOND BASIS IS MATERIALITY. AGAIN, THE FACT THAT A  
02:56PM 19 PATIENT EXPECTED TO GET A BLOOD TEST AND THEN EXPECTED TO MAKE  
02:56PM 20 MEDICAL DECISIONS BASED UPON THAT BLOOD TEST IS RELEVANT.

02:56PM 21 I'LL NOTE AGAIN THERE'S NO INTRINSIC VALUE TO A BLOOD  
02:56PM 22 TEST. IT REALLY LIVES AND DIES BASED ON THE MEDICAL DECISIONS  
02:56PM 23 THAT YOU MAKE BASED UPON THOSE RESULTS.

02:56PM 24 A PATIENT SHOULD BE ALLOWED TO TAKE THE STAND AND TELL THE  
02:56PM 25 COURT, I GOT A TEST, THE TEST SAID X, AND THEN I DID Y IN

02:56PM 1 RESPONSE TO IT.

02:56PM 2 AND IF Y IS, I WENT TO MY DOCTOR, I GOT A SECOND TEST OR A  
02:57PM 3 THIRD TEST, AND HERE'S WHAT THOSE TESTS REVEALED AND HERE ARE  
02:57PM 4 THE DECISIONS THAT I MADE BASED UPON THAT, THAT AGAIN IS  
02:57PM 5 HELPFUL MATERIALITY EVIDENCE BECAUSE IT DOES SUGGEST THAT THE  
02:57PM 6 STATEMENTS THAT THERANOS WAS MAKING TO THESE PATIENTS LED THEM  
02:57PM 7 TO ENGAGE IN THIS TRANSACTION OF THINGS, LED THEM TO BUY THE  
02:57PM 8 BLOOD TEST AND THEN TO RELY UPON THE RESULTS THAT THE BLOOD  
02:57PM 9 TEST PROVIDED.

02:57PM 10 AND THEN I'LL NOTE FOR THE COURT THE THIRD BASIS IS THE  
02:57PM 11 DEFENDANT'S FRAUDULENT INTENT. WHEN MS. HOLMES KNOWS -- AND  
02:57PM 12 THERE ARE EMAILS AND SOME WERE REFERENCED IN THE FILING -- THAT  
02:57PM 13 CERTAIN TESTS WERE UNLIKELY TO PRODUCE ACCURATE RESULTS, THAT  
02:57PM 14 THERE WERE PROBLEMS AT THERANOS WITH GENERATING ACCURATE  
02:57PM 15 RESULTS OF CERTAIN TESTS AND CONTINUES TO OFFER THE TESTS, AND  
02:57PM 16 PATIENTS ARE GETTING THESE INACCURATE RESULTS, IT SPEAKS TO  
02:57PM 17 INTENT. IT IS RELEVANT TO INTENT.

02:57PM 18 IN OTHER WORDS, YOU INTEND THOSE OUTCOMES IF YOU'RE AWARE  
02:57PM 19 THAT THEY'RE LIKELY TO OCCUR. IF A PATIENT GETTING AN  
02:58PM 20 INACCURATE RESULT, IF A PATIENT GETTING RESULT X FROM THERANOS  
02:58PM 21 AND THEN GOING AND GETTING CONFIRMATORY TESTS FROM OTHER LABS  
02:58PM 22 THAT SUGGEST SOMETHING DIFFERENT, AND THAT OUTCOME IS EXPECTED  
02:58PM 23 BY MS. HOLMES, SHE'S NOT SURPRISED BY IT BECAUSE THERE'S  
02:58PM 24 INTERNAL EMAILS SUGGESTING HER KNOWLEDGE OF ACCURACY AND  
02:58PM 25 RELIABILITY PROBLEMS, SHE'S INTENDING THAT OUTCOME TO OCCUR.



02:58PM 1 AND THERE'S A LINE OF CASES THAT TALK ABOUT VICTIMS BEING  
02:58PM 2 VICTIMIZED IS EVIDENCE OF INTENT AND THAT THE OUTCOME THAT  
02:58PM 3 OCCURS CAN SPEAK TO THE INTENT OF THE PERPETRATOR OF THE  
02:58PM 4 OFFENSE.

02:58PM 5 I'LL NOTE FOR THE COURT TWO FINAL POINTS. THE FIRST IS  
02:58PM 6 EARLIER WHEN WE WERE DISCUSSING ANECDOTAL TEST RESULTS, AND THE  
02:58PM 7 COURT NOTED THAT IT HAD SOME OVERLAP, HERE THERE IS CONCERN  
02:59PM 8 ABOUT PATIENTS TESTIFYING BECAUSE THEY -- THERE'S A LACK OF  
02:59PM 9 CAUSATION, THE PATIENTS ARE TALKING ABOUT THEIR BAD TEST  
02:59PM 10 RESULTS, BUT THEY'RE NOT NECESSARILY EXPLAINING THAT THERANOS  
02:59PM 11 WAS THE CAUSE OF THE BAD TEST RESULTS AS OPPOSED TO SITTING ON  
02:59PM 12 THE TARMAC IN 100-DEGREE WEATHER.

02:59PM 13 WE DON'T USE THAT SAME STANDARD IN A PONZI SCHEME, FOR  
02:59PM 14 INSTANCE. IF A VICTIM IN A PONZI SCHEME TESTIFIES, HERE'S WHAT  
02:59PM 15 THE DEFENDANT TOLD ME, AND BECAUSE OF THAT, I GAVE THE  
02:59PM 16 DEFENDANT MY MONEY, WE DON'T EXPECT THE VICTIM TO KNOW THAT THE  
02:59PM 17 DEFENDANT SPENT HER MONEY PAYING OFF NEW INVESTORS OR HAD IN  
02:59PM 18 HER POCKETS OR BUYING MANSIONS. WE DON'T EXPECT THAT KNOWLEDGE  
02:59PM 19 FROM THE VICTIM.

02:59PM 20 THE VICTIM IS ALLOWED TO TAKE THE STAND AND EXPLAIN THEIR  
02:59PM 21 RELATIONSHIP WITH THE DEFENDANT, WHAT CAUSED THEM TO INVEST, OR  
02:59PM 22 TO BUY THE TEST, AND THE EFFECT OF THAT PURCHASE.

02:59PM 23 AND I THINK THE SAME ANALYSIS APPLIES HERE AND THE COURT  
02:59PM 24 SHOULD ALLOW AT LEAST SOME MEASURE OF THE PATIENT'S TESTIMONY  
02:59PM 25 TO THAT END.

02:59PM 1 AND ONE CASE THAT I THINK WAS HELPFUL, AND IT WAS CITED BY  
03:00PM 2 THE DEFENSE HERE, IS THE PACIFIC GAS AND ELECTRIC COMPANY CASE  
03:00PM 3 THAT WAS TRIED BEFORE JUDGE HENDERSON IN THIS DISTRICT.

03:00PM 4 IN THAT CASE THE DEFENSE ARGUED, JUDGE, THIS CASE IS ABOUT  
03:00PM 5 PIPELINE SAFETY ACT VIOLATIONS AND OBSTRUCTION OF JUSTICE. YOU  
03:00PM 6 SHOULD PROHIBIT THE GOVERNMENT FROM MENTIONING THE SAN BRUNO  
03:00PM 7 EXPLOSION OR ITS DEADLY CONSEQUENCES. IT'S NOT RELEVANT.

03:00PM 8 AND JUDGE HENDERSON'S RULING WAS, NO, I DISAGREE. IT IS  
03:00PM 9 OKAY FOR THE JURY TO HEAR ABOUT THE EXPLOSION, AND HE  
03:00PM 10 SPECIFICALLY RULED THAT THE WORD "DEADLY" WAS ADMISSIBLE IN THE  
03:00PM 11 TRIAL.

03:00PM 12 HE DREW LINES THAT THE NUMBER OF DEATHS -- EIGHT PEOPLE  
03:00PM 13 DIED DURING THE EXPLOSION, AND JUDGE HENDERSON SAID THAT'S TOO  
03:00PM 14 FAR, AND THERE WERE LINES THAT HE DREW AROUND HOW MUCH OF THE  
03:00PM 15 EXPLOSION WAS ALLOWED TO COME IN.

03:00PM 16 BUT HE DIDN'T ADOPT THE POSITION THAT THE DEFENSE IS  
03:00PM 17 URGING THE COURT IN THIS INSTANCE AND THAT IS TO PROHIBIT ALL  
03:00PM 18 DISCUSSION OF THE CONSEQUENCE OF THE ACTIONS OF THE TESTS.  
03:01PM 19 THERE IS SOME ROOM FOR IT, AND I THINK WHAT THE COURT SHOULD DO  
03:01PM 20 IS CRAFT THAT LINE, IS THE VICTIMS SHOULD BE ALLOWED TO TAKE  
03:01PM 21 THE STAND AND TELL THE INITIAL CONSEQUENCES OF IT, WHEN THEY  
03:01PM 22 RECEIVED THE TEST, WHAT THEY DID WITH THAT INFORMATION, AND  
03:01PM 23 WHAT FUTURE DECISIONS THEY MADE BASED UPON THAT RESULT, FOR  
03:01PM 24 INSTANCE, THE SECOND TESTS, THE RESULT OF THAT TEST, AND THEIR  
03:01PM 25 EXPERIENCE.

03:01PM 1 I THINK THAT IS THE PLACE THAT IT WOULD BE APPROPRIATE TO  
03:01PM 2 DRAW THE LINE IN THIS INSTANCE, AND IT IS CONSISTENT WITH  
03:01PM 3 JUDGE HENDERSON'S RULING IN PG&E.

03:01PM 4 THE COURT: THANK YOU. LET ME ASK, FIRST OF ALL,  
03:01PM 5 WERE YOU INVOLVED IN THAT TRIAL, MR. SCHENK?

03:01PM 6 MR. SCHENK: I WAS, YOUR HONOR.

03:01PM 7 THE COURT: YES, I THOUGHT SO.

03:01PM 8 BUT THE QUESTION I HAVE -- I DON'T QUARREL WITH AND I  
03:01PM 9 DON'T PART COMPANY WITH THE CONCEPT THAT THE WITNESS COULD  
03:01PM 10 TESTIFY THAT THEY TOOK THE TEST; THE RESULTS, FOR WHATEVER  
03:01PM 11 REASON, WERE SUSPICIOUS TO THEM; THEY TOOK A SECOND TEST AND  
03:01PM 12 RECEIVED MEDICAL ADVICE AND THAT; AND THEN WE THINK WENT AND  
03:02PM 13 DID SOMETHING ELSE. THAT'S WHERE WE MIGHT GET A LITTLE --  
03:02PM 14 THAT'S WHERE I HAVE SOME ISSUE ABOUT THAT.

03:02PM 15 MORE IMPORTANTLY, I THINK THE TESTIMONY, THE POTENTIAL  
03:02PM 16 TESTIMONY THAT I WAS CALLING OUT IS THE ECTOPIC PREGNANCY, FOR  
03:02PM 17 EXAMPLE, AND THE WITNESS THEN TESTIFYING ABOUT THE ANGUISH, THE  
03:02PM 18 PAIN, THE WORRY, ALL OF THAT, AND I COULDN'T SLEEP FOR DAYS, I  
03:02PM 19 WAS WORRIED ABOUT X.

03:02PM 20 THE OTHER PATIENT WHO MAY HAVE RECEIVED A TEST THAT  
03:02PM 21 SUGGESTED A MEDICAL CONDITION, BUT THEN UPON SUBSEQUENT  
03:02PM 22 TESTING, SEEING MY PHYSICIAN, I GOT A DIFFERENT RESULT AND I  
03:02PM 23 DID Y. I TOOK THIS MEDICATION.

03:02PM 24 BUT THEN GOING IN AND SAYING, I COULDN'T SLEEP FOR WEEKS,  
03:02PM 25 I HAD TO CHANGE MY WILL BECAUSE I THOUGHT DEATH WAS IMMINENT,

03:02PM 1 ET CETERA, ET CETERA, THAT'S PROBABLY TOO FAR AND I DON'T THINK  
03:02PM 2 YOU'RE ADVOCATING FOR THAT.

03:02PM 3 MR. SCHENK: CORRECT, YOUR HONOR.

03:03PM 4 IF I CAN REPEAT BACK WHAT THE COURT SAID? I THINK IF A  
03:03PM 5 PATIENT WERE TO TAKE THE STAND AND SAY, TO USE THE COURT'S  
03:03PM 6 EXAMPLE, I RECEIVED A THERANOS TEST AND I THOUGHT I HAD CANCER,  
03:03PM 7 OR I THOUGHT I HAD A SEVERE CONDITION, AND ONE THING I DID IN  
03:03PM 8 RESPONSE TO IT WAS TO GO GET OTHER TESTS, AND AFTER I RECEIVED  
03:03PM 9 A SECOND TEST AND THEN CONSULTED WITH MY PHYSICIAN, I  
03:03PM 10 DETERMINED, OR MY PHYSICIAN TOLD ME I DIDN'T HAVE CANCER.

03:03PM 11 I THINK THAT'S APPROPRIATE AND THE COURT COULD LIMIT IT  
03:03PM 12 THERE.

03:03PM 13 I AGREE WITH THE COURT, THERE IS NOT THE NEED THEN FOR THE  
03:03PM 14 PATIENT TO SAY, THERE WAS TWO WEEKS BETWEEN THOSE TWO TESTS AND  
03:03PM 15 HERE'S HOW I FELT DURING THOSE TWO WEEKS.

03:03PM 16 IF THE COURT SAID THAT'S 403 AND THAT'S TOO FAR, WE  
03:03PM 17 RESPECT THE RULING.

03:03PM 18 THE AMOUNT OF TIME I THINK MIGHT BE RELEVANT AND THE  
03:03PM 19 PATIENT SHOULD BE ALLOWED TO EXPLAIN THAT BECAUSE THAT'S PART  
03:03PM 20 OF THE STORY, BUT THE FEELINGS THAT THE PATIENT HAD DURING THAT  
03:03PM 21 INTERVENING TWO WEEKS IS AN APPROPRIATE PLACE FOR THE COURT TO  
03:03PM 22 DRAW THE LINE.

03:03PM 23 THE COURT: MS. TREFZ, DO YOU WANT TO COME TO THE  
03:04PM 24 LECTERN.

03:04PM 25 SO THE TRAIL, IF YOU WILL, OF TESTING IS WHAT I THINK --

03:04PM 1 I'LL CALL IT THAT -- THE TRAIL OF TESTING, A TEST THAT WAS  
03:04PM 2 EITHER SUSPECTED TO BE INCORRECT OR CAUSED A PATIENT TO BE  
03:04PM 3 RETESTED AT A DIFFERENT SOURCE, DO YOU HAVE PROBLEMS WITH THAT?

03:04PM 4 MS. TREFZ: YOUR HONOR, WE HAVE A GENERAL RELEVANCE  
03:04PM 5 OBJECTION BASED ON THE ANECDOTAL REST RESULTS ISSUE.

03:04PM 6 BUT TO THE EXTENT THAT THIS MOTION IS PRIMARILY KIND OF  
03:04PM 7 SEPARATELY AIMED AT THE 403 AND IN THE EXTREME KIND OF --

03:04PM 8 THE COURT: THIS IS REGARDING EMOTIONAL REACTION.

03:04PM 9 MS. TREFZ: RIGHT, EXACTLY. I THINK THAT IS  
03:04PM 10 POTENTIALLY A FAIR LINE TO DRAW.

03:04PM 11 I THINK PART OF IT DEPENDS ON WHETHER THAT LINE IS  
03:04PM 12 ACTUALLY OBSERVED AS YOU'RE -- AS THE TESTIMONY IS BEING  
03:05PM 13 ELICITED.

03:05PM 14 YOU KNOW, THEY'RE ASKING SOMEBODY WHAT THEY DID NEXT  
03:05PM 15 VERSUS --

03:05PM 16 THE COURT: LET ME STOP YOU THERE.

03:05PM 17 MR. SCHENK, IF THE COURT MAKES A RULING, ARE YOU INCLINED  
03:05PM 18 TO FOLLOW THE RULING?

03:05PM 19 MR. SCHENK: YES.

03:05PM 20 THE COURT: ALL RIGHT. I THINK THAT ANSWERS THE  
03:05PM 21 QUESTION PERHAPS.

03:05PM 22 MS. TREFZ: WELL, IT'S EASY TO SAY IN THE ABSTRACT,  
03:05PM 23 AND SOMETIMES WHEN YOU'RE IN THE MOMENT IT CAN BE -- WE CAN GET  
03:05PM 24 FAR AFIELD KIND OF QUICK.

03:05PM 25 THE COURT: WELL, LET ME SAY, IN THE THICK OF TRIAL,

03:05PM 1 I KNOW THAT THINGS COME UP AND PEOPLE SAY THINGS THAT THEY  
03:05PM 2 REGRET OR SAY THINGS UNINTENTIONALLY. WE ALL UNDERSTAND THAT.

03:05PM 3 BUT WE'RE TALKING ABOUT INTENTIONALLY ASKING A QUESTION  
03:05PM 4 THAT THEY KNOW IS NOT GOING TO BE PERMITTED. THAT'S WHY I  
03:05PM 5 WANTED TO GO THROUGH THIS COLLOQUY HERE, AND I COULD SEE -- I  
03:05PM 6 CALL IT THE TRAIL OF TESTING -- JUST IF SOMEBODY GOT A TEST AND  
03:05PM 7 THEY GOT A SECOND TEST, A SECOND OPINION -- AND I THINK THAT'S  
03:05PM 8 VERY COMMON IN THE MEDICAL INDUSTRY -- AND THEN THEY GOT THE  
03:06PM 9 SECOND TEST AND CONSULTED WITH A PHYSICIAN, EITHER THE SAME OR  
03:06PM 10 A SECOND, AND THEN THEY DID X.

03:06PM 11 WITHOUT TESTIFYING ABOUT ANY JOY, FEAR, HAPPINESS, ANY  
03:06PM 12 EMOTION THAT OCCURRED, BECAUSE THAT'S NOT THE REASON FOR THE  
03:06PM 13 TESTIMONY. IT'S IRRELEVANT WHAT THE EMOTION OF THE PATIENT  
03:06PM 14 WAS. WHAT'S RELEVANT IS WHAT THEY DID AND ANY SUBSEQUENT  
03:06PM 15 CONDUCT TO THE INITIAL TEST. THAT'S THE RELEVANCE, I THINK.

03:06PM 16 MR. SCHENK: YES, YOUR HONOR.

03:06PM 17 MS. TREFZ: YES, I THINK THAT IS A REASONABLE PLACE  
03:06PM 18 TO LAND, YOUR HONOR.

03:06PM 19 THE COURT: OKAY. I THINK WE FINISHED WITH 562.  
03:06PM 20 GREAT.

03:06PM 21 MR. SCHENK: THANK YOU VERY MUCH.

03:06PM 22 THE COURT: THANK YOU. SHOULD WE TAKE 10 MINUTES?

03:06PM 23 MS. SAHARIA: SURE, YOUR HONOR.

03:06PM 24 THE COURT: LET'S DO THAT NOW. WE'LL TAKE A  
03:06PM 25 10-MINUTE BREAK. THANK YOU.

(RECESS FROM 3:06 P.M. UNTIL 3:21 P.M.)

THE COURT: WE'RE BACK ON THE RECORD. ALL PARTIES PREVIOUSLY PRESENT ARE PRESENT ONCE AGAIN.

WE HAVE TWO MOTIONS IN LIMINE REMAINING THIS AFTERNOON. WE'LL SEE HOW WE DO. I TOLD YOU I WOULD LIKE TO FINISH AT 4:00. THAT, CANDIDLY, IS FOR CONVENIENCE OF THE PARTIES IF NOTHING ELSE.

LET ME -- WHAT I'D LIKE TO DO IS TO CALL A MATTER OUT OF ORDER, THOUGH. I THINK WE CAN DISCUSS DOCKET 570, AND THIS IS MS. HOLMES'S MOTION TO EXCLUDE CUSTOMER SERVICE SPREADSHEETS THAT REFLECT CUSTOMARY FEEDBACK.

AND I THINK, WHEN I LOOK AT THE TWO REMAINING, 569 AND 570, MY SENSE IS THIS ONE, I THINK, SHOULD NOT REQUIRE A LOT OF DISCUSSION, AND SO I THOUGHT WE COULD TAKE THIS ONE UP NOW AND WHATEVER TIME WE HAVE LEFT WE CAN TALK ABOUT 569.

LET ME JUST STATE AN OBSERVATION, THAT THIS IS A MOTION -- JUST LOOKING AT THE PLEADINGS, THE COURT MAY DEFER RULING ON THIS SUBJECT TO THE GOVERNMENT LAYING A FOUNDATION, OR BEING ABLE TO LAY A FOUNDATION FOR SOME OF THE INFORMATION IN REGARDS TO THE SPREADSHEETS -- THAT'S JUST A HIGH LEVEL OBSERVATION THAT I HAVE FROM THE PLEADINGS -- AND IN REGARDS TO AUTHENTICATION AND THOSE ISSUES.

SO IT MIGHT BE SOMEWHAT -- I THINK THE DEFENSE SAYS IT'S A LITTLE PREMATURE HERE.

BUT THAT'S MY INITIAL REVIEW OF THIS, BUT I'M HAPPY TO

03:23PM 1 HEAR FROM THE PARTIES.

03:23PM 2 IS THIS YOUR MOTION, MS. SAHARIA?

03:23PM 3 MS. SAHARIA: IT'S NOT MY MOTION. I'D LIKE TO  
03:23PM 4 INTRODUCE THE COURT TO OUR COLLEAGUE, J.R. FLEURMONT. HE'S  
03:23PM 5 GOING TO ADDRESS THE REMAINING TWO MOTIONS.

03:23PM 6 THE COURT: OH, LOVELY. THANK YOU.

03:23PM 7 GOOD AFTERNOON.

03:23PM 8 MR. FLEURMONT: GOOD AFTERNOON.

03:23PM 9 THE COURT: WELCOME TO SAN JOSE.

03:24PM 10 MR. FLEURMONT: THANK YOU. I'M HAPPY TO BE HERE.

03:24PM 11 THE COURT: SO I'D LIKE TO TAKE 570 FIRST, AND YOU  
03:24PM 12 HEARD MY PRELIMINARY OBSERVATION ABOUT THIS. MAYBE THAT HELPS  
03:24PM 13 YOU WITH YOUR ARGUMENT. I DON'T MEAN TO -- YOU'RE GOING TO BE  
03:24PM 14 SPEAKING THROUGHOUT THE WEEK, I EXPECT, ON OTHER MOTIONS.

03:24PM 15 MR. FLEURMONT: THAT'S CORRECT.

03:24PM 16 THE COURT: RIGHT. SO I DON'T MEAN TO SUGGEST THAT  
03:24PM 17 I'M TRYING TO CUT YOU OFF, BUT I THINK YOU HAVE A HEADS UP  
03:24PM 18 ABOUT WHAT I'M THINKING ABOUT HERE.

03:24PM 19 MR. FLEURMONT: YES, YOUR HONOR.

03:24PM 20 YOUR HONOR IS EXACTLY RIGHT. THE COURT'S OBSERVATIONS  
03:24PM 21 ECHO THE CONCERNS THAT WE HAVE ABOUT THIS PARTICULAR PIECE OF  
03:24PM 22 EVIDENCE.

03:24PM 23 TO PUT IT BRIEFLY, THE GOVERNMENT HAS FAILED TO LINK THESE  
03:24PM 24 SPREADSHEETS TO ANY KNOWLEDGE THAT MS. HOLMES EVER KNEW ABOUT  
03:24PM 25 THEM. THE GOVERNMENT HAS FAILED TO LAY A FOUNDATION AS TO THE



03:24PM 1 AUTHENTICATION OF THESE SPREADSHEETS. EVEN THE EXHIBITS THAT  
03:24PM 2 THE GOVERNMENT CITES SHOWS THAT THERE'S ISSUES WITH THE CONTENT  
03:24PM 3 OF THE SPREADSHEETS AND ISSUES WITH HOW THEY'RE FORMED, AND NOT  
03:24PM 4 TO MENTION ALL OF THE HEARSAY ISSUES, THE HEARSAY ISSUES ABOUT  
03:24PM 5 THE SPREADSHEETS THEMSELVES AND THE CONTENTS WITHIN THE  
03:25PM 6 SPREADSHEETS.

03:25PM 7 THE COURT: OKAY. WELL, LET'S -- WHO STANDS FOR THE  
03:25PM 8 GOVERNMENT?

03:25PM 9 MR. BOSTIC. THANK YOU.

03:25PM 10 MR. BOSTIC: YES, YOUR HONOR. GOOD AFTERNOON.

03:25PM 11 THE COURT: AND YOU HEARD MY INITIAL OBSERVATIONS.  
03:25PM 12 I HOPE THAT'S HELPFUL TO YOU.

03:25PM 13 MR. BOSTIC: I DID, YOUR HONOR.

03:25PM 14 I THINK IT MAKES SENSE TO AVOID CERTAINLY A BLANKET RULING  
03:25PM 15 AT THIS TIME AND APPROACH EXHIBITS OR PORTIONS OF EXHIBITS ON A  
03:25PM 16 CASE-BY-CASE BASIS.

03:25PM 17 THE GOVERNMENT CERTAINLY INTENDS TO LAY AN APPROPRIATE AND  
03:25PM 18 SUFFICIENT FOUNDATION FOR ANY OF THESE EXHIBITS THAT IT INTENDS  
03:25PM 19 TO INTRODUCE AT TRIAL.

03:25PM 20 I THINK IT'S QUITE CLEAR FROM THE CASE LAW CITED BY THE  
03:25PM 21 GOVERNMENT THAT THIS KIND OF EVIDENCE CAN OVERCOME A HEARSAY  
03:25PM 22 OBJECTION. I THINK THE NINTH CIRCUIT HAS RULED ON THAT  
03:25PM 23 CONCLUSIVELY.

03:25PM 24 AND IN THIS CASE SPECIFICALLY, EVEN WHERE THERE IS NO  
03:25PM 25 EVIDENCE OF THIS DEFENDANT HAVING A COMPLETE COMPLAINT LOG ON

03:25PM 1 HER DESK AT SOME POINT, THERE IS MUCH EVIDENCE IN THE RECORD  
03:26PM 2 SHOWING THAT SHE WAS GENERALLY KEPT APPRISED OF THESE  
03:26PM 3 COMPLAINTS AS THEY CAME INTO THE COMPANY.

03:26PM 4 THERE IS EVIDENCE IN MULTIPLE FORMS SHOWING THAT THE  
03:26PM 5 DEFENDANT HAD NUMEROUS CONVERSATIONS WITH OTHERS AT THERANOS,  
03:26PM 6 THAT INDIVIDUAL PATIENT COMPLAINTS WERE REPORTED UP THE CHAIN  
03:26PM 7 TO BOTH DEFENDANTS IN THIS CASE AND THOSE IN THEIR IMMEDIATE  
03:26PM 8 ORBIT, AND ON THAT BASIS IT'S CERTAINLY EASY TO CONCLUDE THAT  
03:26PM 9 THE CUSTOMER COMPLAINTS THEMSELVES, THEIR EXISTENCE IS THE  
03:26PM 10 FOUNDATION FOR THAT OTHER EVIDENCE AND THAT THEIR EXISTENCE  
03:26PM 11 TENDS TO SHOW HOLMES'S KNOWLEDGE OF THE COMPLAINTS THAT  
03:26PM 12 THERANOS RECEIVED.

03:26PM 13 THE COURT: WELL, TO YOUR POINT ABOUT THE COURT  
03:26PM 14 SHOULD NOT ISSUE, IN YOUR OPINION THE COURT SHOULD NOT ISSUE A  
03:26PM 15 BLANKET PRECLUSION, I THINK OF THIS EVIDENCE, I THINK THAT'S  
03:26PM 16 WHAT I WAS SAYING, MR. FLEURMONT, IS THAT I THINK THE COURT  
03:26PM 17 SHOULD DEFER AND DETERMINE WHETHER OR NOT ADDITIONAL EVIDENCE  
03:27PM 18 WOULD BE HELPFUL FOR A FOUNDATIONAL BASIS AND MAKE THAT  
03:27PM 19 DECISION WHEN THAT EVIDENCE OR THAT FOUNDATION IS PRESENTED IN  
03:27PM 20 SOME MANNER BEFORE THE COURT, OR THE EVIDENCE IS PRESENTED  
03:27PM 21 BEFORE THE COURT WITH THAT FOUNDATION.

03:27PM 22 MR. BOSTIC: NO OBJECTION TO THAT APPROACH,  
03:27PM 23 YOUR HONOR.

03:27PM 24 THE COURT: SO I'LL DEFER THIS, 570. EXCUSE ME.  
03:27PM 25 NOW WE'RE BACK TO 569. SO THANK YOU FOR THAT.

03:27PM 1 MR. FLEURMONT, YOU HAVE THAT AS WELL?

03:27PM 2 MR. FLEURMONT: YES, YOUR HONOR.

03:27PM 3 YOUR HONOR, EARLIER TODAY THE GOVERNMENT IN ITS OPPOSITION  
03:27PM 4 TO ANECDOTAL EVIDENCE MOTION STATED THIS IS NOT A CASE ABOUT  
03:27PM 5 WHETHER CERTAIN CONDUCT MET INDUSTRY STANDARDS, AND WE AGREE.

03:27PM 6 ALLEGED VIOLATIONS OF INDUSTRY STANDARDS ARE NOT RELEVANT  
03:27PM 7 TO THIS CASE FOR REASONS THAT I'LL DISCUSS.

03:27PM 8 ALTHOUGH THAT'S THE GOVERNMENT'S REPRESENTATION TODAY, IN  
03:27PM 9 ITS 404(B) NOTICE, THAT'S EXHIBIT 1 AT PAGE 7, CATEGORY 14  
03:28PM 10 STATES THE GOVERNMENT ALLEGES THAT VIOLATIONS OF INDUSTRY  
03:28PM 11 STANDARDS AND GOVERNMENT REGULATIONS SUPPORTS THE GOVERNMENT'S  
03:28PM 12 BROAD ALLEGATIONS THAT THERANOS TECHNOLOGY WAS, IN FACT, NOT  
03:28PM 13 CAPABLE OF CONSISTENTLY PRODUCING ACCURATE AND RELIABLE  
03:28PM 14 RESULTS.

03:28PM 15 THE GOVERNMENT CITES TO FOUR CATEGORIES OF EVIDENCE IN  
03:28PM 16 SUPPORT OF THOSE BROAD ALLEGATIONS. THE FIRST IS CLINICAL  
03:28PM 17 TRIAL EVIDENCE. THE GOVERNMENT ALLEGES THAT THERANOS FAILED TO  
03:28PM 18 IMPLEMENT A CLEAR, INFORMED CONSENT PROTOCOLS AND THAT THEY  
03:28PM 19 FOSTERED A CULTURE OF COURSE OF TESTING ENVIRONMENT.

03:28PM 20 THE SECOND CATEGORY RELATES TO RESEARCH AND DEVELOPMENT  
03:28PM 21 VALIDATION STUDIES. THE GOVERNMENT ALLEGES THAT THERANOS  
03:28PM 22 FAILED TO HAVE ADEQUATE VALIDATION STUDIES AND THAT THEY USED  
03:28PM 23 INSUFFICIENT DATA TO SUPPORT THOSE STUDIES.

03:28PM 24 THE THIRD CATEGORY IS GENERAL INCOMPLIANCE WITH FEDERAL  
03:28PM 25 REGULATIONS.

03:28PM 1 AND THE FOURTH CATEGORY IS RELATED TO AGENCY REPORTS WHICH  
03:28PM 2 WILL BE ADDRESSED BY MY COLLEAGUE IN A SEPARATE MOTION IN  
03:28PM 3 LIMINE.

03:28PM 4 I'D LIKE TO START WITH THE FIRST CATEGORY OF CLINICAL  
03:28PM 5 TRIALS. THIS RELATES TO LANGUAGE IN THE 404(B) NOTICE THAT  
03:29PM 6 THERANOS ALSO CUT CORNERS IN ITS ARIZONA RESEARCH AND  
03:29PM 7 DEVELOPMENT TESTING AND FAILED TO IMPLEMENT A CLEAR PROTOCOL  
03:29PM 8 FOR INFORMED CONSENT FOR TRIAL PARTICIPANTS AND FOSTERED A  
03:29PM 9 COERCIVE ENVIRONMENT FOR TESTING.

03:29PM 10 NOW, THE GOVERNMENT HAS FAILED TO PROVIDE ANY EVIDENCE IN  
03:29PM 11 SUPPORT OF THAT ALLEGATION IN ITS 404(B) EVIDENCE. DESPITE  
03:29PM 12 SUPPLEMENTING ITS 404(B) NOTICE TWICE IN THIS CASE, THE  
03:29PM 13 GOVERNMENT HAS NOT POINTED TO A PIECE OF EVIDENCE OR TESTIMONY  
03:29PM 14 AS AN EXHIBIT IN SUPPORT OF THAT ALLEGATION IN VIOLATION OF  
03:29PM 15 LOCAL RULE 16-1, AS THE COURT VERY WELL KNOWS, THAT IT REQUIRES  
03:29PM 16 THE GOVERNMENT TO PROVIDE A SUMMARY OF ANY EVIDENCE OF OTHER  
03:29PM 17 CRIMES, WRONGS, OR ACTS WHICH THE GOVERNMENT INTENDS TO OFFER  
03:29PM 18 AND TO SUPPORT THAT SUMMARY WITH DOCUMENTARY EVIDENCE, WITNESS  
03:29PM 19 STATEMENTS IN SUFFICIENT DETAIL THAT THE COURT MAY RULE  
03:29PM 20 PRETRIAL ON THE PROFFERED EVIDENCE.

03:29PM 21 AFTER MS. HOLMES POINTED THIS OUT IN HER OPENING MOTION,  
03:30PM 22 THE GOVERNMENT FAILED TO, IN ITS OPPOSITION, EVEN ADDRESS THE  
03:30PM 23 LACK OF EVIDENCE ON THIS ISSUE; AND THEREFORE, BECAUSE THE  
03:30PM 24 GOVERNMENT HAS NOT CITED TO A PIECE OF EVIDENCE, THE GOVERNMENT  
03:30PM 25 HAS NOT RESPONDED TO MS. HOLMES POINTING THAT ISSUE OUT, THE

GOVERNMENT HAS CONCEDED THIS ISSUE AND THE COURT SHOULD ISSUE A RULING PRECLUDING THAT EVIDENCE.

THE NEXT CATEGORY RELATES TO R&D VALIDATION, AND THIS IS RELATING TO THE GOVERNMENT'S ALLEGATION AND ITS 404(B) NOTICE THAT THERANOS FAILED TO CONDUCT ADEQUATE VALIDATION STUDIES, RELIED ON INSUFFICIENT DATA TO CLAIM THAT THE TESTS WERE VALID, ACCURATE, AND RELIABLE. AGAIN, THAT'S AT EXHIBIT 1 ON PAGE 7.

NOW, SIMILARLY, THE GOVERNMENT AGAIN, WITHOUT CITING ANY EVIDENCE, ALLEGES A FAILURE TO CONDUCT ADEQUATE VALIDATION STUDIES. THE GOVERNMENT DOES NOT POINT TO ANY DATA TO SUPPORT ITS ALLEGATION, DOESN'T EXPLAIN WHAT AN ADEQUATE VALIDATION STUDY IS, AND DOESN'T EVEN EXPLAIN WHAT SUFFICIENT DATA WOULD BE TO SUPPORT THAT STUDY. THIS WOULD BE IN VIOLATION OF LOCAL RULE 16-1.

AND IN THE GOVERNMENT'S OPPOSITION, ITS ONLY DEFENSE TO THIS CATEGORY IS TO SAY THAT IT EXPECTS THAT WITNESSES WILL TESTIFY THAT THERANOS LAUNCH EFFORTS WERE RUSHED IN 2013, BUT THE ONLY EVIDENCE CITED IN THE GOVERNMENT'S OPPOSITION IS DIRECTLY CONTRARY TO THAT ALLEGATION.

THE COURT -- EXCUSE ME, THE GOVERNMENT POINTS TO TESTIMONY BY DR. ADAM ROSENDORFF, THE FORMER LAB DIRECTOR OF THERANOS, AND WHAT MR. ROSENDORFF -- OR DR. ROSENDORFF, EXCUSE ME, SAYS IN HIS DEPOSITION TESTIMONY WAS THAT HE DID NOT, QUOTE, FEEL PRESSURE INDIVIDUALLY FROM MANAGEMENT TO GET THESE VALIDATION REPORTS SIGNED. THAT'S AT GOVERNMENT'S EXHIBIT 38, DOCKET

03:31PM 1 681-2.

03:31PM 2 HE ALSO SAID THAT HE WAS ONLY GOING TO SIGN THE VALIDATION  
03:31PM 3 REPORTS IF THEY MET HIS STANDARDS AND THAT THERE WERE NO  
03:31PM 4 VALIDATION REPORTS BEFORE OR AFTER THE LAUNCH THAT HE REFUSED  
03:31PM 5 TO SIGN.

03:31PM 6 SO THE ONLY EVIDENCE THAT THE COURT -- THE ONLY EVIDENCE  
03:31PM 7 THAT THE GOVERNMENT POINTS TO IN SUPPORT OF THAT ALLEGATION IS  
03:31PM 8 DIRECTLY CONTRARY TO THE ALLEGATION THAT THEY SAY HAD TO DO  
03:31PM 9 WITH THE VALIDATION TESTING.

03:31PM 10 AND FOR THAT REASON WE ASK THE COURT TO EXCLUDE THAT  
03:32PM 11 CATEGORY OF EVIDENCE AS WELL.

03:32PM 12 THE LAST CATEGORY I'LL DISCUSS TODAY IS THE GENERAL  
03:32PM 13 CATEGORY OF VIOLATION OF INDUSTRY STANDARDS AND GOVERNMENT  
03:32PM 14 REGULATIONS. THIS IS ALSO AT EXHIBIT 1 AT PAGE 7 IN WHICH THE  
03:32PM 15 GOVERNMENT ALLEGES THAT IN FURTHERANCE OF THE SCHEME TO  
03:32PM 16 DEFRAUD, THE DEFENDANTS FAILED TO CONFORM TO INDUSTRY  
03:32PM 17 STANDARDS, AS WELL AS GOVERNMENT REGULATIONS OR RULES REGARDING  
03:32PM 18 CLINICAL LABORATORY STANDARDS.

03:32PM 19 THIS EVIDENCE SHOULD BE EXCLUDED BECAUSE THE GENERAL RULE  
03:32PM 20 IS THAT EVIDENCE OF VIOLATIONS OF FEDERAL LAW ARE IMPERMISSIBLE  
03:32PM 21 EXPERT TESTIMONY IN A CIVIL OR A CRIMINAL CASE.

03:32PM 22 THE GOVERNMENT SEEKS TO ADMIT THIS TESTIMONY THROUGH TWO  
03:32PM 23 OF ITS EXPERTS. ONE IS DR. MASTER, AND THE OTHER ONE IS  
03:32PM 24 DR. ADAM ROSENDORFF.

03:32PM 25 AS THIS COURT KNOWS, BECAUSE IT HELD IN LUKOV, L-U-K-O-V,

03:32PM 1 VERSUS SCHINDLER ELEVATOR CORP, 2012 WESTLAW 2428251, AN EXPERT  
03:33PM 2 WITNESS CANNOT GIVE AN OPINION AS FOR A LEGAL CONCLUSION. AS  
03:33PM 3 THE NINTH CIRCUIT STATED IN UNITED STATES VERSUS SHOLL, EXPERTS  
03:33PM 4 DO NOT TESTIFY ABOUT THE LAW BECAUSE IT IS THE JUDGE'S DUTY TO  
03:33PM 5 INFORM THE JURY ABOUT THE LAW THAT IS RELEVANT TO THEIR  
03:33PM 6 DELIBERATIONS.

03:33PM 7 YOUR HONOR, FROM THESE CASES AND OTHERS, IT'S CLEAR THAT  
03:33PM 8 NO GOVERNMENT WITNESS MAY PROVIDE HIS OR HER LEGAL CONCLUSION  
03:33PM 9 AS TO ANY LAW THAT WAS ALLEGEDLY VIOLATED OR REGULATION THAT  
03:33PM 10 WAS ALLEGEDLY VIOLATED IN THIS CASE.

03:33PM 11 NOW, THE GOVERNMENT UNDERSTANDS THAT GENERAL RULE, BUT  
03:33PM 12 THEY SEEK A CARVEOUT IN THIS CASE AND THEY ARGUE THAT THERE  
03:33PM 13 SHOULD BE NO RULE AGAINST ADMISSION OF LEGAL CONCLUSIONS  
03:33PM 14 COMMUNICATED TO A DEFENDANT. THAT'S AT DOCKET 670 AT PAGE 4.

03:33PM 15 BUT ALL OF THE GOVERNMENT'S CASES THAT THEY CITE ARE  
03:33PM 16 DISTINGUISHABLE BECAUSE THEY DEAL WITH A SIMILAR FACT PATTERN.  
03:33PM 17 IN EACH CASE THERE'S AN ATTORNEY FOR THE DEFENDANT EXPLAINING  
03:33PM 18 TO THE DEFENDANT THAT THE CONDUCT THAT THEY'RE ENGAGING IN MAY  
03:33PM 19 BE A CRIME AND LATER THAT PERSON IS CHARGED FOR THE SAME OR THE  
03:33PM 20 EXACT SAME CRIME, THE SAME OR SIMILAR CRIME.

03:34PM 21 IN THIS CASE THE EVIDENCE THAT THE GOVERNMENT POINTS TO  
03:34PM 22 FOR SOMEONE TELLING MS. HOLMES ABOUT A VIOLATION OF A  
03:34PM 23 CRIMINAL -- A VIOLATION OF A FEDERAL REGULATION IS NOT AN  
03:34PM 24 ATTORNEY. IT'S DR. ADAM ROSENDORFF. HE IS A REGULAR  
03:34PM 25 INDIVIDUAL. HE'S NOT AN ATTORNEY. MS. HOLMES IS NOT CHARGED

03:34PM 1 WITH CRIMINAL VIOLATIONS OF CLINICAL LABORATORY IMPROVEMENT  
03:34PM 2 AMENDMENTS, WHICH IS THE REGULATION THAT HE POINTS OUT, A  
03:34PM 3 CHARGE THAT WAS AVAILABLE TO THE GOVERNMENT, AND THE EVIDENCE  
03:34PM 4 CITED BY THE GOVERNMENT IS NOT RELEVANT TO WHETHER MS. HOLMES  
03:34PM 5 KNOWINGLY VIOLATED THE WIRE FRAUD ACT BY PERSISTING IN CONDUCT  
03:34PM 6 AFTER RECEIVING ADVICE THAT HER CONDUCT WAS IN VIOLATION OF  
03:34PM 7 THAT WIRE FRAUD ACT.

03:34PM 8 THE CASES THE GOVERNMENT CITES STAND FOR THE SIMPLE  
03:34PM 9 PROPOSITION THAT WHEN AN ATTORNEY TELLS A DEFENDANT THAT HE OR  
03:34PM 10 SHE IS DIRECTLY VIOLATING A CRIME FOR WHICH HE OR SHE LATER  
03:34PM 11 WILL BE CHARGED, THAT IS RELEVANT TO INTENT.

03:34PM 12 NOTABLY, IN THIS CASE THERE IS NO ALLEGATION THAT AN  
03:34PM 13 ATTORNEY TOLD MS. HOLMES THAT THERE'S A VIOLATION OF THE WIRE  
03:34PM 14 FRAUD ACT.

03:34PM 15 THE COURT: SO LET ME ASK YOU, IF DR. ROSENDORFF --  
03:35PM 16 HE WAS THE LAB DIRECTOR, I THINK; IS THAT CORRECT?

03:35PM 17 MR. FLEURMONT: THAT'S CORRECT, YOUR HONOR.

03:35PM 18 THE COURT: SO AS LAB DIRECTOR, SHOULD WE KNOW OR  
03:35PM 19 SHOULD WE ASSUME OR DO WE KNOW THAT THAT IS A POSITION OF ART,  
03:35PM 20 IF YOU WILL; THAT IS, HE WAS IN CHARGE OF THE FUNCTIONS, THE  
03:35PM 21 DAILY OPERATIONS, THE REPORTING, ALL OF THE THINGS IN THE  
03:35PM 22 LABORATORY, THAT FALLS UNDER HIS DOMAIN, ISN'T THAT HIS CHARGE?  
03:35PM 23 ISN'T THAT WHAT HE DOES AS LAB DIRECTOR? HE MAKES SURE THE LAB  
03:35PM 24 OPERATES, FUNCTIONS SMOOTHLY, EFFICIENTLY, PROFITABLY, AND  
03:35PM 25 LEGALLY? IS THAT PART OF HIS DUTIES?



03:35PM 1 MR. FLEURMONT: THAT'S CORRECT, YOUR HONOR.

03:35PM 2 PART OF THE LAB DIRECTOR'S DUTY IS TO MAKE SURE THAT THE  
03:35PM 3 TESTS THAT ARE COMING OUT OF THE LAB ARE ACCURATE AND RELIABLE  
03:35PM 4 AND MAKE SURE THE LAB IS FUNCTIONING.

03:35PM 5 BUT THE DISCONNECT OF THAT FACT PATTERN AND WHAT IS GOING  
03:35PM 6 ON HERE IS THAT -- AND PARTICULARLY GOING BACK TO THE CASES  
03:35PM 7 THAT THE GOVERNMENT HAS CITED -- IT'S NOT AN ATTORNEY PROVIDING  
03:35PM 8 LEGAL ADVICE ABOUT THE CONDUCT FOR WHICH SOMEONE IS LATER  
03:36PM 9 CHARGED.

03:36PM 10 HERE THIS IS A DOCTOR TALKING ABOUT LAB OPERATIONS THAT  
03:36PM 11 ARE NOT -- AND THERE'S NO ALLEGATION OR THERE'S NO ADVICE AND  
03:36PM 12 THERE'S NO STATEMENT IN THERE ABOUT VIOLATIONS OF THE WIRE  
03:36PM 13 FRAUD ACT, THE CRIME FOR WHICH MS. HOLMES IS CHARGED.

03:36PM 14 THE COURT: WELL, HE'S NOT SAYING THAT -- HE'S NOT  
03:36PM 15 OFFERING A LEGAL OPINION THAT THE LAB WAS LEGALLY IN VIOLATION.

03:36PM 16 HE'S, AS I UNDERSTAND IT -- AND PLEASE HELP ME OUT HERE --  
03:36PM 17 AS I UNDERSTAND IT, BECAUSE OF HIS POSITION, BECAUSE OF THE  
03:36PM 18 HIGH LEVEL POSITION THAT HE HAD A LAB DIRECTOR, HE SHOULD KNOW  
03:36PM 19 ABOUT REGULATIONS, HE KNOWS CLIA REGULATIONS, THOSE ARE  
03:36PM 20 IMPORTANT TO A FUNCTIONING -- A CERTIFIED FUNCTIONING LAB AND  
03:36PM 21 IF THEY'RE CONTINUING TO DO THE WORK, THEY NEED TO BE CERTIFIED  
03:36PM 22 AND ALL OF THAT, INVOLVED -- SOMETIMES THERE'S CROSSOVER WITH  
03:36PM 23 THE FDA AND OTHERS. SO HE KNOWS THOSE THINGS.

03:37PM 24 ISN'T THE CONDUCT HERE THE FACT THAT HE LOOKED AT THE LAB  
03:37PM 25 AS LAB DIRECTOR AND NOTED SOME THINGS THAT PARTED COMPANY WITH

03:37PM 1 CLIA REGULATIONS THAT HE KNOWS, HE KNOWS ABOUT, AND THEN HE  
03:37PM 2 INFORMED EITHER MS. HOLMES OR ADMINISTRATION THAT THE LAB WAS  
03:37PM 3 NOT IN COMPLIANCE WITH THOSE REGULATIONS, NOT THAT WE'RE  
03:37PM 4 VIOLATING THE LAW, BUT RIGHT NOW THE REGULATIONS REQUIRE X,  
03:37PM 5 WHATEVER IT IS, AND WE'RE NOT DOING X, WHATEVER THAT IS.

03:37PM 6 IS THAT TOO SIMPLISTIC?

03:37PM 7 IT SEEMS LIKE THAT'S WHAT HE DID. SO HE'S NOT OFFERING  
03:37PM 8 LEGAL OPINION ABOUT ANY VIOLATIONS. HE'S TALKING ABOUT  
03:37PM 9 REGULATIONS THAT, AS LAB DIRECTOR, HE'S SUPPOSED TO KNOW. I  
03:37PM 10 ASSUME THAT'S WHY HE WAS HIRED, BECAUSE OF HIS BACKGROUND,  
03:37PM 11 KNOWLEDGE AND EXPERIENCE. ISN'T THAT WHAT HE'S DOING?

03:37PM 12 MR. FLEURMONT: WELL, NOT QUITE, YOUR HONOR. HE IS  
03:38PM 13 OFFERING LEGAL OPINIONS.

03:38PM 14 I WANT TO BE VERY CLEAR ON THE EVIDENCE THAT WE SEEK TO  
03:38PM 15 EXCLUDE. SO WE'RE SEEKING TO EXCLUDE ANY TESTIMONY BY ANY  
03:38PM 16 WITNESS, NOT JUST DR. ROSENDORFF, THAT HERE IS THIS LAW, HERE'S  
03:38PM 17 WHAT THIS LAW SAYS, THERANOS VIOLATED THIS LAW.

03:38PM 18 THAT, UNDER THE CASE LAW, I THINK IS VERY CLEAR IS  
03:38PM 19 INADMISSIBLE EXPERT OPINION TESTIMONY.

03:38PM 20 THE COURT: THAT'S WHAT I WAS SAYING. PARDON ME FOR  
03:38PM 21 INTERRUPTING YOU. MY THOUGHT WAS THAT HE WAS NOT GOING TO  
03:38PM 22 TESTIFY TO THAT.

03:38PM 23 MR. FLEURMONT: OKAY. WELL, YOUR HONOR, THAT'S NOT  
03:38PM 24 QUITE -- THAT'S NOT OUR UNDERSTANDING BASED ON THE EXHIBITS  
03:38PM 25 THAT THE GOVERNMENT HAS PROVIDED.

03:38PM 1 THE COURT: OKAY.

03:38PM 2 MR. FLEURMONT: WE HAVE A DIFFERENT UNDERSTANDING.

03:38PM 3 FOR EXAMPLE, THE GOVERNMENT PROVIDES AT EXHIBIT 24 AN EMAIL

03:38PM 4 CHAIN THAT I'LL NOTE THAT MS. HOLMES IS NOT ON IN WHICH HE SAYS

03:38PM 5 THAT THESE ARE THE AREAS OF CLIA LAW THAT WE'RE NOT COMPLYING

03:38PM 6 WITH.

03:38PM 7 THE COURT: I'M SORRY. SAY AGAIN.

03:38PM 8 MR. FLEURMONT: THESE ARE THE AREAS OF CLIA LAW IN

03:38PM 9 WHICH WE ARE NOT COMPLYING.

03:39PM 10 THE COURT: OKAY. SO IT SOUNDS LIKE IT'S A LITTLE

03:39PM 11 BIT OF BOTH OF WHAT I SAID, WHAT MY OBSERVATION WAS, I CALLED

03:39PM 12 THEM REGULATIONS, AND HE SAID THAT WE'RE NOT IN COMPLIANCE WITH

03:39PM 13 CLIA.

03:39PM 14 MR. FLEURMONT: IT'S A FEDERAL REGULATION,

03:39PM 15 YOUR HONOR.

03:39PM 16 THE COURT: RIGHT, REGULATION. HE DIDN'T SAY THAT

03:39PM 17 WE'RE BREAKING THE LAW. HE DIDN'T SAY WE SHOULD LAWYER UP

03:39PM 18 BECAUSE WE'RE BREAKING THE LAW. PARDON ME.

03:39PM 19 BUT HE SAID THERE'S A REGULATION THAT WE'RE NOT FOLLOWING

03:39PM 20 HERE.

03:39PM 21 MR. FLEURMONT: YOUR HONOR, I THINK THAT'S A --

03:39PM 22 THE COURT: IS THAT TOO SIMPLISTIC?

03:39PM 23 MR. FLEURMONT: I DON'T WANT TO CALL YOUR HONOR

03:39PM 24 SIMPLISTIC.

03:39PM 25 THE COURT: NO, NO. I SAID IT.

03:39PM 1 MR. FLEURMONT: I THINK THAT'S A DISTINCTION WITHOUT  
03:39PM 2 A DIFFERENCE TO SAY THAT WE'RE NOT IN COMPLIANCE WITH FEDERAL  
03:39PM 3 LAW AND TO SAY THAT WE'RE VIOLATING FEDERAL LAW. IT'S  
03:39PM 4 EFFECTIVELY THE SAME THING, YOUR HONOR.

03:39PM 5 THE COURT: OKAY.

03:39PM 6 MR. FLEURMONT: AND WE SEEK TO EXCLUDE -- THAT'S THE  
03:40PM 7 EVIDENCE THAT WE SEEK TO EXCLUDE.

03:40PM 8 BUT PUTTING LEGAL CONCLUSIONS ASIDE, THE EVIDENCE OF  
03:40PM 9 VIOLATION OF INDUSTRY STANDARDS IS NOT RELEVANT TO THIS CASE  
03:40PM 10 FOR OTHER REASONS.

03:40PM 11 THE GOVERNMENT HAS ALLEGED THAT MS. HOLMES MISREPRESENTED  
03:40PM 12 TO INVESTORS AND PAYING CUSTOMERS THAT THERANOS COULD PROVIDE  
03:40PM 13 ACCURATE AND RELIABLE TEST RESULTS DESPITE KNOWING THAT  
03:40PM 14 THERANOS TECHNOLOGY WAS IN FACT, AND I QUOTE, NOT CAPABLE OF  
03:40PM 15 CONSISTENTLY PRODUCING ACCURATE AND RELIABLE RESULTS.

03:40PM 16 WE SUBMIT THAT THE EVIDENCE OF VIOLATION OR ALLEGED  
03:40PM 17 VIOLATION OF INDUSTRY STANDARDS IS NOT RELEVANT TO THAT CHIEF  
03:40PM 18 ALLEGATION IN THIS CASE, WHICH IS PARAGRAPH 16 OF THE  
03:40PM 19 GOVERNMENT'S THIRD SUPERSEDING INDICTMENT.

03:40PM 20 FIRST, THE GOVERNMENT'S RETAINED EXPERT CANNOT EVEN OPINE  
03:40PM 21 THAT ANY SUCH VIOLATION OF INDUSTRY STANDARDS AFFECTS ACCURACY  
03:40PM 22 AND RELIABILITY. HE SIMPLY STATES THAT IT COULD HAVE A  
03:40PM 23 POTENTIAL TO AFFECT ACCURACY AND RELIABILITY.

03:40PM 24 SO EVEN THE GOVERNMENT'S OWN RETAINED EXPERT UNDERSTANDS  
03:41PM 25 THAT THERE'S NOT THAT STRONG OF A CONNECTION IN THIS CASE.

03:41PM 1 SECOND, THE GOVERNMENT CMS WITNESS HAS EXPLAINED, CMS DOES  
03:41PM 2 NOT DETERMINE ACCURACY OR RELIABILITY OF TESTS. RATHER, IT  
03:41PM 3 LOOKS TO SEE IF THE LAB IS FOLLOWING ITS OWN POLICIES, AND  
03:41PM 4 THAT'S SARAH BENNETT. AND THAT'S AT EXHIBIT 31, WHICH IS THE  
03:41PM 5 DEPOSITION TESTIMONY OF MS. BENNETT.

03:41PM 6 AND MOREOVER, THIS GOES BACK TO THE ORIGINAL POINT, THE  
03:41PM 7 404(B) NOTICE IN WHICH THE GOVERNMENT MADE THESE ALLEGATIONS  
03:41PM 8 AND CITED THESE DOCUMENTS DID NOT INCLUDE ANY DOCUMENT THAT HAD  
03:41PM 9 MS. HOLMES COPIED OR THAT SHOWED MS. HOLMES'S AWARENESS OF THIS  
03:41PM 10 ISSUE.

03:41PM 11 AND SO FOR THOSE REASONS WE BELIEVE THAT THE RELEVANCE IS  
03:41PM 12 SLIM TO NONE WHEN IT COMES TO INDUSTRY STANDARDS.

03:41PM 13 THE LAST POINT I'D LIKE TO MAKE, YOUR HONOR, IS RELATED TO  
03:41PM 14 THE PREJUDICIAL EFFECT OF THIS TESTIMONY.

03:41PM 15 EVEN IF THE COURT WERE TO FIND THAT THERE WAS SOME MINIMAL  
03:41PM 16 PROBATIVE RELEVANCE TO THIS, WE FEEL THAT THAT RELEVANCE IS  
03:41PM 17 SUBSTANTIALLY OUTWEIGHED BY A PREJUDICIAL EFFECT, AND THIS IS  
03:42PM 18 BECAUSE IF THE COURT WAS TO ALLOW THE JURY TO HEAR REPEATEDLY  
03:42PM 19 ABOUT EVIDENCE RELATED TO INDUSTRY STANDARDS AND VIOLATIONS OF  
03:42PM 20 FEDERAL REGULATIONS, THERE'S A SERIOUS DANGER THAT THE JURY  
03:42PM 21 COULD CONVICT BASED ON THEIR UNDERSTANDING OF A VIOLATION OF A  
03:42PM 22 FEDERAL REGULATION.

03:42PM 23 THE COURT: A CIVIL REGULATION THAT THE JURY MIGHT  
03:42PM 24 THEN SAY, WELL, THE DANGER IS THAT THERE MIGHT BE A CONVICTION  
03:42PM 25 OF A CRIMINAL STATUTE BASED ON A CIVIL REGULATION.

03:42PM 1 MR. FLEURMONT: THAT'S EXACTLY RIGHT, YOUR HONOR.

03:42PM 2 WITH THAT, I'LL YIELD MY TIME.

03:42PM 3 THE COURT: OKAY. THANK YOU.

03:42PM 4 MR. LEACH, THIS IS THE FIRST TIME TODAY WE HEAR FROM YOU.

03:42PM 5 MR. LEACH: I KNOW, YOUR HONOR. I HOPE TO LIVE UP  
03:42PM 6 TO THE STANDARD OF MY COLLEAGUES. GOOD AFTERNOON.

03:42PM 7 ROBERT LEACH FOR THE UNITED STATES.

03:42PM 8 THE DEFENSE SEEKS A CATEGORICAL EXCLUSION OF ANY EVIDENCE,  
03:42PM 9 ARGUMENT, REFERENCES TO VIOLATIONS OF INDUSTRY STANDARDS OR  
03:42PM 10 GOVERNMENT REGULATIONS AND RULES, A CATEGORICAL RULE ON THAT IN  
03:43PM 11 THIS CASE.

03:43PM 12 AND IT RAISED THREE ARGUMENTS FOR THIS CATEGORICAL RULE:  
03:43PM 13 RELEVANCE, 403, AND THE RULE THAT THEY HAVE CONJURED UP WHICH  
03:43PM 14 IS THAT NONLAWYERS CAN'T TALK ABOUT WHAT THEY COMMUNICATED TO  
03:43PM 15 THE DEFENDANTS ABOUT THE LAW DURING THE SCHEME TO DEFRAUD.

03:43PM 16 THEY DID NOT RAISE A 404 OBJECTION. THEY DRAW A LOT ON  
03:43PM 17 THE 404(B) NOTICE, BUT I THINK MUCH OF WHAT WE'RE TALKING ABOUT  
03:43PM 18 IS NOT GENERALLY 404(B) EVIDENCE, YOUR HONOR.

03:43PM 19 I THINK WHEN YOU GET DOWN INTO THE SPECIFICS, YOU SEE WHY  
03:43PM 20 THIS CATEGORICAL RULE THAT THEY'RE ARGUING FOR IS NOT  
03:43PM 21 WARRANTED, AND I WANT TO FOCUS ON EXHIBIT 24, THIS IS AT DOCKET  
03:43PM 22 582-8. THIS IS THE EMAIL THAT MY FRIEND ON THE OTHER SIDE WAS  
03:43PM 23 TALKING ABOUT FROM DR. ROSENDORFF TITLED -- WHERE HE'S RAISING  
03:43PM 24 ISSUES ABOUT THERANOS'S LAB AND TESTING THAT HAD BEEN DONE FOR  
03:44PM 25 THE EDISON TO DATE.

03:44PM 1 THIS EMAIL IS FORWARDED TO MS. HOLMES, SO THERE'S AMPLE  
03:44PM 2 EVIDENCE THAT SHE KNEW ABOUT IT.

03:44PM 3 THERE'S ADDITIONAL EMAILS WHERE SHE'S COMMUNICATING ABOUT  
03:44PM 4 THE RESPONSE TO DR. ROSENDORFF IN RESPONSE TO THIS EMAIL.

03:44PM 5 AND THE THRUST OF WHAT DR. ROSENDORFF IS SAYING IN THIS  
03:44PM 6 EMAIL TO MR. BALWANI, WHICH GETS FORWARDED TO MS. HOLMES, AND  
03:44PM 7 THAT'S -- THE FORWARDING IS, IN THE GOVERNMENT'S OPPOSITION, IS  
03:44PM 8 ESSENTIALLY THAT WE HAVEN'T DONE SOME OF THE STUDIES THAT ARE  
03:44PM 9 NECESSARY TO RUN OUR LAB CONSISTENTLY WITH CLIA.

03:44PM 10 THE COURT: THIS IS DR. ROSENDORFF?

03:44PM 11 MR. LEACH: THIS IS DR. ROSENDORFF.

03:44PM 12 AND YOUR HONOR TOUCHED ON THE ROLE OF DR. ROSENDORFF. HE  
03:44PM 13 IS THE LAB DIRECTOR. HIS DUTIES INCLUDE MAKING SURE THAT THIS  
03:44PM 14 LAB IS OPERATING CORRECTLY, IN A SAFE WAY, COMPLIANT WITH  
03:44PM 15 FEDERAL LAW, COMPLIANT WITH STATE LAW.

03:44PM 16 IF THOSE THINGS DON'T HAPPEN, THERE CAN BE CONSEQUENCES  
03:45PM 17 FOR HIM, SO HE NEEDS TO BE -- YOU KNOW, THESE ARE NOT  
03:45PM 18 REGULATIONS THAT AFFECT JUST LAWYERS. THESE ARE REGULATIONS  
03:45PM 19 THAT AFFECT HIM AND HIS CONDUCT AND THAT HE'S TESTED ON AND  
03:45PM 20 THAT HE HAS TO KNOW ABOUT. SO HE'S VERY MUCH IN A POSITION TO  
03:45PM 21 HAVE INFORMATION ABOUT WHAT HE'S TALKING ABOUT.

03:45PM 22 AND ESSENTIALLY IN NOVEMBER OF 2013, HE'S RAISING RED  
03:45PM 23 FLAGS ABOUT WHAT THERANOS IS DOING IN ITS LAB. HE'S SAYING  
03:45PM 24 THAT WE HAVE NOT RUN THE RIGHT TESTS FOR OUR EDISON DEVICE, THE  
03:45PM 25 DEVICE THAT ALL OF THE INVESTORS CARE ABOUT. HE'S SAYING, WE

03:45PM 1 NEED TO DO X, Y, AND Z BEFORE WE DO THIS IN OUR LAB.

03:45PM 2 I CAN'T THINK OF MORE SIGNIFICANT INTENT EVIDENCE THAN  
03:45PM 3 THIS.

03:45PM 4 THIS IS NOT DR. ROSENDORFF INSTRUCTING THE JURY ON WHAT  
03:45PM 5 THE LAW IS. WE ACKNOWLEDGE THAT IS THE COURT'S JOB. THE COURT  
03:45PM 6 EXPOUNDS ON WHAT THE CONTRACT MEANS AND THE COURT WILL GIVE  
03:45PM 7 JURY INSTRUCTIONS AT THE END OF THE DAY.

03:46PM 8 BUT THERE ARE MANY, MANY SITUATIONS WHERE NONLAWYERS  
03:46PM 9 COMMUNICATE TO A PERSON IN REALTIME ABOUT RED FLAGS, ABOUT  
03:46PM 10 THINGS THAT THEY'RE DOING RIGHT AND THEY'RE DOING WRONG, AND  
03:46PM 11 THEY'RE ESSENTIALLY TRYING TO CREATE THIS RULE THAT IF IT'S  
03:46PM 12 COUCHED IN SOME LEGAL TERM OR SOME ABIDING BY A CONDITION, THAT  
03:46PM 13 IT'S OUT AND IT HAS NO RELEVANCE.

03:46PM 14 AND THAT CAN'T BE RIGHT, YOUR HONOR. THAT WOULD MEAN THAT  
03:46PM 15 A CFO, A NONLAWYER, WHO TELLS THE CEO OF A COMPANY, WE'RE  
03:46PM 16 RECOGNIZING REVENUE INCORRECTLY, OR WE'RE BACKDATING STOCK  
03:46PM 17 OPTIONS AND WE SHOULDN'T DO THAT, CAN'T COME IN, IMPERMISSIBLE  
03:46PM 18 LEGAL OPINION.

03:46PM 19 OR IF A SCIENTIST GOES TO THE CHIEF MARKETING OFFICER AND  
03:46PM 20 SAYS, I DON'T FEEL GOOD ABOUT HOW WE'RE MARKETING THIS, THIS  
03:46PM 21 DOESN'T SEEM RIGHT TO ME, IT SEEMS BAD, CAN'T COME IN,  
03:46PM 22 IMPERMISSIBLE LEGAL OPINION UNDER THEIR RULE.

03:46PM 23 THIS IS KEY INTENT, STATE OF MIND, PLAN, KNOWLEDGE  
03:47PM 24 EVIDENCE THAT GOES DIRECTLY TO WHAT THE DEFENDANT KNEW ABOUT  
03:47PM 25 HER LAB, KNEW WHAT WAS GOING ON IN THERE, AND WHAT SHE DOES



03:47PM 1 ABOUT IT.

03:47PM 2 I THINK ANOTHER CRITICAL PIECE OF EVIDENCE THAT WE CITE TO  
03:47PM 3 PROVE THIS CONCEPT IS EXHIBIT 26, WHICH IS 583, AND THIS IS  
03:47PM 4 DR. ROSENDORFF TELLING TO MR. BALWANI IN AN EMAIL, WHICH  
03:47PM 5 ULTIMATELY GETS FORWARDED TO MS. HOLMES, FOR PROFICIENCY  
03:47PM 6 TESTING, WE'RE NOT 100 PERCENT OF THE TIME DOING IT THE WAY WE  
03:47PM 7 SHOULD BE DOING IT. WE SHOULD BE DOING IT ON THE THERANOS  
03:47PM 8 DEVICES THAT ARE ACTUALLY USED IN OUR LAB, AND WE'RE NOT DOING  
03:47PM 9 THAT.

03:47PM 10 HE DOESN'T SAY, WE'RE VIOLATING THE LAW. HE SAYS, WE'RE  
03:47PM 11 NOT DOING THAT 100 PERCENT OF THE TIME AND WE SHOULD BE.

03:47PM 12 THE COURT: AND THAT EMAIL IS IN THE CHARGING TIME  
03:47PM 13 PERIOD?

03:47PM 14 MR. LEACH: ABSOLUTELY, YOUR HONOR. IT'S MARCH OF  
03:47PM 15 2014, APPROXIMATELY.

03:47PM 16 AND EVEN IF IT WERE COUCHED IN, WE'RE NOT COMPLYING WITH  
03:48PM 17 THE REGULATION, DR. ROSENDORFF IS PERFECTLY CAPABLE OF, BECAUSE  
03:48PM 18 HE'S THE REGULATED PERSON, OF TALKING ABOUT HIS CONCERNS.

03:48PM 19 AND THEY CAN CROSS-EXAMINATION HIM ABOUT HIS NOT BEING A  
03:48PM 20 LAWYER, HIS NOT KNOWING WHAT HE TALKS ABOUT.

03:48PM 21 THEY POINT TO LANGUAGE IN THE EMAIL WHERE HOLMES SUGGESTS  
03:48PM 22 SHE MIGHT HAVE GOTTEN ADVICE FROM SOMEONE ELSE. THEY CAN  
03:48PM 23 CROSS-EXAMINATION DR. ROSENDORFF ABOUT IT. BUT IT DOESN'T  
03:48PM 24 DIMINISH THE RELEVANCE, IT DOESN'T RAISE 403 CONCERNS, AND IT  
03:48PM 25 CERTAINLY DOESN'T IMPINGE ON THE COURT'S RESPONSIBILITY TO

03:48PM 1 INSTRUCT THE JURY ON WHAT THE LAW IS.

03:48PM 2 AND TO THE EXTENT THAT THERE'S ANY DOUBT ABOUT THIS, THIS  
03:48PM 3 CAN BE CURED WITH AN INSTRUCTION. THE COURT CAN SAY SHE'S NOT  
03:48PM 4 ACCUSED OF VIOLATING 42 CFR 1274 OR THIS.

03:48PM 5 THIS EVIDENCE IS OFFERED TO SHOW HER STATE OF MIND, HER  
03:48PM 6 INTENT, HER KNOWLEDGE OF PROBLEMS WITHIN THE LAB, WHICH SHE  
03:49PM 7 DOES NOT FIX.

03:49PM 8 AND THESE TWO ISOLATED EXAMPLES, YOUR HONOR, ARE IMPORTANT  
03:49PM 9 BECAUSE THEY CULMINATE IN NOVEMBER OF 2014 WHEN DR. ROSENDORFF  
03:49PM 10 GOES TO MS. HOLMES AGAIN AND SAYS, I AM NOT COMFORTABLE WITH  
03:49PM 11 WHAT WE'RE DOING IN THE LAB. I CAN NO LONGER STAND BY THESE  
03:49PM 12 RESULTS. YOU NEED TO FIND ANOTHER LAB DIRECTOR.

03:49PM 13 AND WHAT DO THEY DO? THEY FORCE HIM OUT, AND THEN THEY  
03:49PM 14 HARASS HIM WITH THREATS OF VIOLATING CONFIDENTIALITY.

03:49PM 15 ALL OF THIS, THIS ENTIRE ARC IS DEEPLY PROBATIVE OF HER  
03:49PM 16 STATE OF MIND, HER INTENT, HER PLAN, AND HER MOTIVE.

03:49PM 17 AND I WOULD ALSO ADD, YOUR HONOR, THEY GO OUT OF THEIR  
03:49PM 18 WAY -- AND WE CITED TWO CASES IN THE BRIEF, GRAPH AND MCCLAREN.  
03:49PM 19 THESE STAND FOR THE OBVIOUS POSITION THAT IF SOMEONE IS RAISING  
03:49PM 20 RED FLAGS ABOUT THE LAWFULNESS OF SOMEBODY'S CONDUCT DURING  
03:49PM 21 THIS SCHEME, THAT OBVIOUSLY GOES TO THEIR INTENT AND THEIR  
03:49PM 22 STATE OF MIND.

03:49PM 23 THE FACT THAT IT CAME FROM A LAB DIRECTOR INSTEAD OF A  
03:50PM 24 LAWYER IS A DIFFERENCE WITHOUT A MEANING IN THIS PARTICULAR  
03:50PM 25 INSTANCE, PARTICULARLY BECAUSE OF THE LAB DIRECTOR'S DUTIES.

03:50PM 1 THEY'RE ESSENTIALLY ARGUING FOR A RULE THAT SAYS IF  
03:50PM 2 INSIDERS RAISE RED FLAGS ABOUT MISCONDUCT, UNLESS THEY HAVE A  
03:50PM 3 LAW DEGREE, IT'S NOT ADMISSIBLE, AND THAT'S JUST NOT SUPPORTED  
03:50PM 4 BY ANY OF THE CASES THAT THEY HAVE CITED OR COMMON SENSE.

03:50PM 5 IT WOULD, IT WOULD ESSENTIALLY IMMUNIZE EVIDENCE OF A  
03:50PM 6 DEFENDANT'S KNOWLEDGE THAT HAPPENS TO COME COUCHED IN TERMS OF  
03:50PM 7 A LEGAL OPINION.

03:50PM 8 THEY HAVE ALSO, UNDER THIS GUISE OF VIOLATING INDUSTRY  
03:50PM 9 STANDARDS AND GOVERNMENT VIOLATIONS, MOVED TO EXCLUDE EVIDENCE  
03:50PM 10 OF THERANOS'S REVELATION STUDIES, WHICH THEY DON'T EVEN MAKE  
03:50PM 11 THE ARGUMENT IS ACTUALLY 404(B) EVIDENCE. IT'S PART OF THE  
03:50PM 12 SCHEME TO DEFRAUD. IT'S PART OF THE UNDERLYING BASIS FOR WHAT  
03:51PM 13 HAPPENED HERE.

03:51PM 14 THE GOVERNMENT'S POINT WITH THESE VALIDATION STUDIES,  
03:51PM 15 YOUR HONOR, IS THAT IN 2013 THERANOS GOES VERY PUBLIC WITH ITS  
03:51PM 16 TECHNOLOGY AND SAYS THAT WE HAVE A DEVICE THAT CAN RUN ALL OF  
03:51PM 17 THE TESTS, AND WE'RE GOING TO BE COMPETING WITH LABCORP AND  
03:51PM 18 QUEST AND ESSENTIALLY SAY WE'RE READY AND WE'RE NOW MAKING IT  
03:51PM 19 AVAILABLE TO CONSUMERS.

03:51PM 20 WELL, IT TURNS OUT THERANOS INSIDERS, INCLUDING  
03:51PM 21 DR. ROSENDORFF, INCLUDING SHEKAR CHANDRASEKARAN, INCLUDING  
03:51PM 22 OTHERS WERE SAYING WE'RE NOT READY, MS. HOLMES, AND THESE  
03:51PM 23 VALIDATION STUDIES ARE RUSHED AND YOU'RE PUTTING TOO MUCH  
03:51PM 24 PRESSURE ON US, AND SOME OF THEM ARE NOT COMING BACK IN THE WAY  
03:51PM 25 WE WANT.

03:51PM 1 AND THE THRUST OF THIS EVIDENCE IS THAT THEY ANNOUNCE THAT  
03:51PM 2 THEY ARE READY WITHOUT HAVING DONE THE WORK AND WITHOUT HAVING  
03:51PM 3 THE STUDIES TO BACK THEM UP.

03:51PM 4 I DON'T THINK THAT'S 404(B) EVIDENCE. THAT WASN'T THE  
03:51PM 5 BASIS FOR THE MOTION IN THE FIRST INSTANCE. WE INCLUDE IT IN  
03:52PM 6 THE NOTICE BECAUSE WE WANT TO BE TRANSPARENT ABOUT WHERE WE ARE  
03:52PM 7 GOING AND WHAT WE'RE GOING TO OFFER.

03:52PM 8 BUT THESE ARE DEEPLY RELEVANT TO WHETHER OR NOT THERANOS  
03:52PM 9 COULD REALLY DO WHAT IT SAID IT COULD DO WHEN IT ANNOUNCED ITS  
03:52PM 10 TECHNOLOGY TO THE WORLD IN SEPTEMBER OF 2013.

03:52PM 11 SO I DON'T SEE A BASIS TO EXCLUDE THESE VALIDATION  
03:52PM 12 STUDIES.

03:52PM 13 WITH RESPECT TO INDUSTRY STANDARDS, IT IS RELEVANT. IT'S  
03:52PM 14 RELEVANT BECAUSE MS. HOLMES HELD OUT TO THE WORLD HER  
03:52PM 15 COMPLIANCE WITH CLIA AS PART OF THE WAY INVESTORS AND PATIENTS  
03:52PM 16 COULD ENSURE THAT THE TESTS WERE ACCURATE AND RELIABLE. SHE  
03:52PM 17 PUT THAT IN A POWERPOINT TO HER BOARD MEMBERS. SHE TOLD THAT  
03:52PM 18 TO THE PRESS.

03:52PM 19 WHEN COMING UNDER SCRUTINY, SHE SAID, YOU DON'T NEED TO  
03:52PM 20 WORRY ABOUT FDA REGULATION HERE. I'M COMPLYING WITH CLIA.  
03:53PM 21 THIS ENSURES THE ACCURACY AND RELIABILITY OF MY TESTING.

03:53PM 22 SO THE FACT THAT THEY ARE NOT COMPLYING WITH CLIA OR  
03:53PM 23 INDUSTRY STANDARDS IS PART OF THE EVIDENCE THAT SHOWS THAT  
03:53PM 24 THOSE TESTS WERE NOT ACCURATE AND RELIABLE.

03:53PM 25 IF YOU'RE NOT DOING THE THINGS THAT THE INDUSTRY HAS

03:53PM 1 AGREED ARE WHAT CONTRIBUTE TO THAT END PRODUCT, THAT'S A BRICK  
03:53PM 2 IN THE WALL THAT HELPS SHOW THAT THE TESTS WERE, AT THE END OF  
03:53PM 3 THE DAY, NOT ACCURATE AND NOT RELIABLE.

03:53PM 4 DR. MASTER IS EMINENTLY QUALIFIED TO TESTIFY ABOUT THESE  
03:53PM 5 THINGS. THE CMS WITNESSES ARE EMINENTLY QUALIFIED TO TALK  
03:53PM 6 ABOUT THESE THINGS.

03:53PM 7 AND ALL OF THIS IS CURED WITH, TO THE EXTENT THAT THERE IS  
03:53PM 8 ANY PREJUDICE -- AND I DON'T THINK THERE IS ANY PREJUDICE --  
03:53PM 9 IT'S CURED WITH AN INSTRUCTION: MS. HOLMES IS CHARGED WITH  
03:53PM 10 VIOLATING THE WIRE FRAUD STATUTE. ONE OF THE ELEMENTS IS HER  
03:53PM 11 INTENT TO DECEIVE AND CHEAT. YOU HAVE RECEIVED THIS EVIDENCE  
03:53PM 12 PROFFERED BY THE GOVERNMENT AS PART OF THAT ELEMENT AND YOU'RE  
03:53PM 13 NOT TO CONVICT BECAUSE OF A VIOLATION OF AN INDUSTRY STANDARD  
03:54PM 14 OR SOME TYPE OF REGULATION.

03:54PM 15 THE COURT: THIS GETS TO MY OBSERVATION THAT IT'S  
03:54PM 16 IMPORTANT THAT THE JURY NOT CONVICT IN A CRIMINAL CASE WHERE A  
03:54PM 17 CRIMINAL CHARGE BASED ON EVIDENCE OF CIVIL -- A VIOLATION OF A  
03:54PM 18 CIVIL REGULATION, AND CERTAINLY THE GOVERNMENT WOULD NOT ARGUE  
03:54PM 19 THAT TO A JURY.

03:54PM 20 MR. LEACH: WE WOULD NOT ARGUE THAT, YOUR HONOR. I  
03:54PM 21 THINK THE COURT IS GETTING AT THE WOLF CASE AND SOME OF THE  
03:54PM 22 OTHER CASES CITED BY THE DEFENDANT.

03:54PM 23 AND THERE WHERE I THINK THE GOVERNMENT WENT AWRY WAS THAT  
03:54PM 24 IT WAS ARGUING THE DUTY TO DISCLOSE CAME FROM THIS CIVIL  
03:54PM 25 REGULATION AND YOU COULD CONCLUDE THAT SHE MISREPRESENTED

03:54PM 1 SOMETHING TO THESE INVESTORS SIMPLY BY VIOLATING THAT  
03:54PM 2 REGULATION.

03:54PM 3 THAT'S NOT WHAT WE'RE ARGUING HERE. WE'RE ARGUING THAT  
03:54PM 4 THE UNDERLYING FACTS, THE FACT THAT THEY WERE FAILING QUALITY  
03:54PM 5 CONTROL SO MANY TIMES, THE FACT THAT THEY WERE RUNNING PATIENT  
03:54PM 6 SAMPLES AFTER FAILING QUALITY CONTROL, THAT IS -- THAT FACTUAL  
03:55PM 7 EVIDENCE IS EVIDENCE FROM WHICH A JURY COULD CONCLUDE THAT  
03:55PM 8 THESE TESTS WERE NOT ACCURATE AND WERE NOT RELIABLE.

03:55PM 9 SO IT'S THE UNDERLYING FACTS, WHICH THE WITNESSES SHOULD  
03:55PM 10 BE ABLE TO TALK ABOUT WHAT THEY SAW AND DID THERE, THAT THE  
03:55PM 11 GOVERNMENT SEEKS TO ELICIT THAT SHE VIOLATED THIS PARTICULAR  
03:55PM 12 CIVIL REGULATION AND, THEREFORE, CONVICT IS NOT AN ARGUMENT  
03:55PM 13 THAT THE GOVERNMENT IS TRYING TO MAKE.

03:55PM 14 THE COURT: THANK YOU VERY MUCH. THANK YOU.

03:55PM 15 MR. LEACH: THANK YOU, YOUR HONOR.

03:55PM 16 THE COURT: SO A CURATIVE INSTRUCTION, IS THAT  
03:55PM 17 SUFFICIENT?

03:55PM 18 MR. FLEURMONT: NO, YOUR HONOR, IT'S NOT.

03:55PM 19 I'D LIKE TO PICK UP EXACTLY WHERE THE GOVERNMENT LEFT OFF.

03:55PM 20 SO THERE'S A DISTINCTION IN THE PROHIBITION OF  
03:55PM 21 IMPERMISSIBLY INFECTING A TRIAL WITH CIVIL REGULATIONS IN THE  
03:55PM 22 CASE LAW.

03:55PM 23 IN THE UNITED STATES VERSUS WOLF CASE, THE COURT STATED  
03:55PM 24 THAT CREATING A SERIOUS RISK THAT THE JURY WOULD FIND THE  
03:56PM 25 DEFENDANT GUILTY OF A REGULATION BECAUSE THEY FAILED TO COMPLY

03:56PM 1 WITH THAT REGULATION IN A CRIMINAL CASE IS GOING TO LEAD TO  
03:56PM 2 REVERSIBLE ERROR.

03:56PM 3 THAT'S NOT ABOUT MAKING AN EXPLICIT STATEMENT ABOUT THE  
03:56PM 4 REGULATION. THAT'S NOT ABOUT MAKING A SPECIFIC ARGUMENT ABOUT  
03:56PM 5 THE REGULATION. THAT'S JUST ALLOWING THE REGULATION TO  
03:56PM 6 IMPERMISSIBLY INFECT THE TRIAL.

03:56PM 7 THE COURT: SO DOES THAT EVIDENCE EVER COME IN THEN?  
03:56PM 8 AS MR. LEACH SUGGESTED, THE LAB DIRECTOR HAS A -- HE'S GOT AN  
03:56PM 9 IMPORTANT POSITION AND PART OF THAT IS REPORTING UP THE CHAIN  
03:56PM 10 OF COMMAND AND HE REPORTS DEFICIENCIES.

03:56PM 11 YOU'RE SUGGESTING THAT THAT'S NOT ADMISSIBLE.

03:56PM 12 MR. FLEURMONT: NOT QUITE, YOUR HONOR.

03:56PM 13 I UNDERSTAND THE IMPORTANCE OF A LAB DIRECTOR,  
03:56PM 14 PARTICULARLY IN THIS CASE, AND I UNDERSTAND THAT IT'S HIS DUTY  
03:56PM 15 TO DO A VARIETY OF THINGS, AND ONE OF THOSE THINGS IS REPORTING  
03:56PM 16 UP THE CHAIN.

03:56PM 17 WHERE WE'RE DRAWING THE LINE IS FOR A GOVERNMENT WITNESS,  
03:57PM 18 LAB DIRECTOR OR NOT, ANY OF THEIR WITNESSES TO COME IN AND SAY  
03:57PM 19 THIS IS THE LAW AND MY LEGAL CONCLUSION IS THAT THERANOS  
03:57PM 20 VIOLATED THE LAW APPLYING THE FACTS AS THAT PERSON INTERPRETS  
03:57PM 21 THEM TO THIS CASE.

03:57PM 22 THE COURT: SO IF DR. ROSENDORFF, FOR EXAMPLE, IS  
03:57PM 23 NOT PERMITTED TO SAY THAT, HE'S NOT PERMITTED TO SAY, IN MY  
03:57PM 24 OPINION, THERANOS WAS VIOLATING THE LAW, BUT HE IS PERMITTED TO  
03:57PM 25 TESTIFY THAT HE HAS KNOWLEDGE, BECAUSE OF HIS EDUCATION,

03:57PM 1 BACKGROUND, HE WAS HIRED AS LAB DIRECTOR, WHAT ARE THE DUTIES  
03:57PM 2 AND RESPONSIBILITIES OF THAT CHAIN OF COMMAND REPORTING,  
03:57PM 3 WHATEVER IT IS, AND HE SAYS, AS LAB DIRECTOR I'M FAMILIAR WITH  
03:57PM 4 CLIA REGULATIONS. AS LAB DIRECTOR I FELT THAT WE WEREN'T  
03:57PM 5 FOLLOWING THOSE REGULATIONS, I REPORTED THAT.

03:58PM 6 CAN HE TESTIFY ABOUT THAT? CAN HE SAY THAT?

03:58PM 7 MR. FLEURMONT: YOUR HONOR, IT'S THAT MIDDLE PART  
03:58PM 8 THAT I THINK IS PROHIBITED BY THE CASE LAW, THAT WE WEREN'T  
03:58PM 9 FOLLOWING REGULATIONS, WE WERE IN VIOLATION OF A PARTICULAR  
03:58PM 10 REGULATION.

03:58PM 11 THE COURT: HE DOESN'T SAY VIOLATION. HE SAID, WE  
03:58PM 12 WERE NOT FOLLOWING THE REGULATIONS AS -- MAYBE HE SAYS, AS I  
03:58PM 13 UNDERSTAND THEM TO BE BASED ON MY TRAINING AND EXPERIENCE AND  
03:58PM 14 KNOWLEDGE AS A LAB DIRECTOR. CAN HE SAY THAT? CAN HE TESTIFY  
03:58PM 15 AS TO -- NOT AS A LAWYER, NOT AS ANYONE WITH A LEGAL DEGREE,  
03:58PM 16 BUT AS A LAB DIRECTOR, CAN HE SAY THAT?

03:58PM 17 AGAIN, PART OF HIS JOB DUTY IS TO REPORT, TO OBSERVE, TO  
03:58PM 18 MAKE SURE THAT THE LAB IS IN COMPLIANCE, AND I GUESS I'M -- I  
03:58PM 19 HOPE YOU CAN TELL I'M STRUGGLING A LITTLE BIT WITH WHY CAN'T  
03:59PM 20 SOMEONE SAY, I WAS DOING MY JOB AND MY JOB IS TO REPORT WHAT I  
03:59PM 21 BELIEVE ARE ERRORS IN THE FUNCTIONING AND THE OPERATION?

03:59PM 22 I'M NOT SAYING THAT WE'RE VIOLATING THE LAW -- OR LET ME  
03:59PM 23 SAY THIS, HE WOULDN'T TESTIFY THAT, IN MY OPINION, WE WERE  
03:59PM 24 VIOLATING THE LAW. HE WOULDN'T BE PERMITTED TO SAY THAT. HE  
03:59PM 25 WOULDN'T HAVE THE BACKGROUND AS A LAWYER, AS YOU POINT OUT.



03:59PM 1 BUT A QUESTION ABOUT, WERE YOU IN COMPLIANCE WITH THE  
03:59PM 2 REGULATIONS, CLIA REGULATIONS AS YOU KNEW IT?

03:59PM 3 NO.

03:59PM 4 WHY?

03:59PM 5 WELL, THE REGULATIONS REQUIRE TESTING THREE TIMES A DAY AT  
03:59PM 6 X AMOUNT OF HOURS.

03:59PM 7 WERE YOU DOING THAT?

03:59PM 8 NO.

03:59PM 9 IS THAT PERMITTED?

03:59PM 10 MR. FLEURMONT: WELL, YOUR HONOR, THE STRUGGLE I  
03:59PM 11 THINK WITH THIS QUESTION IS THAT AS THE GOVERNMENT POINTED TO  
03:59PM 12 EXHIBIT 24, I TOOK ANOTHER LOOK AT IT AND IN IT HE SAYS, AND I  
03:59PM 13 QUOTE, AS OF TODAY WE ARE IN VIOLATION OF THE STANDARD.

03:59PM 14 THE COURT: SURE.

03:59PM 15 MR. FLEURMONT: SO IT'S DIFFICULT TO WORK WITH THAT  
04:00PM 16 HYPOTHETICAL KNOWING THAT THE TESTIMONY THAT THEY SEEK TO ADMIT  
04:00PM 17 IS, AND I QUOTE, WE ARE IN VIOLATION OF THE STANDARD.

04:00PM 18 BUT TO ANSWER THE COURT'S QUESTION, IT'S OUR POSITION THAT  
04:00PM 19 FOR ANY GOVERNMENT EXPERT, REGARDLESS IF IT'S DR. ROSENDORFF OR  
04:00PM 20 DR. MASTER OR ANY EXPERT, TO COME IN AND SAY, HERE'S THE LAW,  
04:00PM 21 HERE'S HOW THERANOS VIOLATED IT, AND THIS IS MY LEGAL  
04:00PM 22 CONCLUSION, IT'S CLEARLY IMPERMISSIBLE UNDER THE CASE LAW.

04:00PM 23 NOW, EVEN IF THE COURT WERE TO DISAGREE, WE DO HAVE OUR  
04:00PM 24 RELEVANCE OBJECTIONS, AND AS I STATED BEFORE, THIS GOES BACK TO  
04:00PM 25 TWO OF THE GOVERNMENT WITNESSES EXPLICITLY STATING THAT -- ONE,

04:00PM 1 THE FIRST BEING DR. MASTER, THAT THE VIOLATION OF INDUSTRY  
04:00PM 2 STANDARDS COULD POTENTIALLY LEAD TO AN ISSUE WITH ACCURACY AND  
04:00PM 3 RELIABILITY AND DOESN'T DRAW THAT CLEAR CONNECTION, AND THIS IS  
04:00PM 4 THE GOVERNMENT'S RETAINED EXPERT.

04:00PM 5 AND NOW WE HAVE THE GOVERNMENT'S CMS WITNESS WHO SAYS THAT  
04:01PM 6 IT'S NOT CMS'S JOB TO PASS ON THE ACCURACY AND RELIABILITY OF  
04:01PM 7 THE TEST JUST TO SEE IF THERANOS IS FOLLOWING ITS OWN  
04:01PM 8 STANDARDS.

04:01PM 9 THE COURT: SO MAY I STOP YOU AND ASK MR. LEACH,  
04:01PM 10 MR. LEACH, IS IT YOUR INTENT TO ASK DR. ROSENDORFF WHETHER OR  
04:01PM 11 NOT, IN HIS OPINION, THE LAB WAS VIOLATING THE LAW AND HIM TO  
04:01PM 12 SAY, THIS IS MY LEGAL CONCLUSION?

04:01PM 13 MR. LEACH: I WOULDN'T ASK HIM IF THAT WAS HIS LEGAL  
04:01PM 14 CONCLUSION, YOUR HONOR.

04:01PM 15 I WOULD ASK HIM, WAS THERANOS COMPLYING WITH THE STANDARD?  
04:01PM 16 WAS THERANOS MEETING THE CONDITIONS THAT IT WAS OBLIGATED TO  
04:01PM 17 MEET?

04:01PM 18 I CERTAINLY WOULDN'T FRAME IT IN TERMS OF VIOLATION OF THE  
04:01PM 19 CRIMINAL CODE.

04:01PM 20 BUT I COME BACK TO THIS IDEA, YOUR HONOR, ALL OF THE CASES  
04:01PM 21 THEY'RE TALKING ABOUT IN TERMS OF IMPERMISSIBLE LEGAL OPINION  
04:01PM 22 ARE REALLY WHEN A RETAINED EXPERT COMES IN AND TRIES TO  
04:01PM 23 ESSENTIALLY USURP YOUR HONOR'S ROLE IN TELLING THE JURY WHAT  
04:02PM 24 THE LAW IS.

04:02PM 25 THIS EVIDENCE IS RELEVANT BECAUSE IT'S COMMUNICATED TO THE

04:02PM 1 DEFENDANT IN REAL TIME, AND IT'S HER REACTION TO THIS THAT  
04:02PM 2 MATTERS.

04:02PM 3 DOES SHE SHOW DR. ROSENDORFF THE TEN REASONS WHY THEY  
04:02PM 4 ACTUALLY WERE COMPLYING? NO. EVERYBODY AGREES THAT THEY  
04:02PM 5 WEREN'T AND SHE SAYS, WE'RE GOING TO FIX THIS, WE'RE GOING TO  
04:02PM 6 FIX THIS.

04:02PM 7 AND THEN IT COMES UP AGAIN IN MARCH OF 2014, AND WHAT DOES  
04:02PM 8 SHE DO? NOTHING.

04:02PM 9 AND THEN IT ULTIMATELY COMES TO A PEAK IN NOVEMBER OF  
04:02PM 10 2015.

04:02PM 11 AND SO I CAN'T GLEAN FROM ANY OF THE CASES THAT THEY  
04:02PM 12 CITED, PARTICULARLY IN LIGHT OF GRAPH AND MCCLAREN, THIS IDEA  
04:02PM 13 THAT A LAY WITNESS, WHEN THEY'RE RAISING RED FLAGS -- IMAGINE  
04:02PM 14 THE WHISTLEBLOWER WHO GOES TO THE CEO AND SAYS, WE'RE DOING  
04:02PM 15 THESE 15 THINGS WRONG IN THE BANK. I'M NOT A LAWYER, BUT I'VE  
04:02PM 16 BEEN AT THE BANK FOR 20 YEARS AND THIS MAKES ME FEEL BAD.

04:02PM 17 NOBODY WOULD SUGGEST THAT THAT DOESN'T COME IN AS  
04:03PM 18 KNOWLEDGE OF THE CEO'S INTENT.

04:03PM 19 THEY'RE REALLY CRAFTING A RULE THAT WOULD EXCLUDE ANY TYPE  
04:03PM 20 OF RED FLAG EVIDENCE THAT IS COUCHED IN TERMS OF A LEGAL  
04:03PM 21 OPINION, AND THERE IS OVERLAP IN THE RESPONSIBILITIES THAT  
04:03PM 22 DR. ROSENDORFF HAS AS THE LAB DIRECTOR. IT'S HIS JOB TO COMPLY  
04:03PM 23 WITH THESE, YOU KNOW, IN ADDITION TO THE OWNER.

04:03PM 24 SO I THINK ALL OF THESE ISSUES ARE CURED WITH A GOOD JURY  
04:03PM 25 INSTRUCTION AND CROSS-EXAMINATION.

04:03PM 1 YOU'RE NOT A LAWYER, ARE YOU, DR. ROSENDORFF? YOU DON'T  
04:03PM 2 KNOW HOW MANY LAWYERS MS. HOLMES TALKED TO, DO YOU,  
04:03PM 3 DR. ROSENDORFF?

04:03PM 4 AND IT REALLY GOES TO THE WEIGHT OF WHAT HE'S SAYING, NOT  
04:03PM 5 SOME CONTRAVENTION OF THE RULE THAT THIS IS IMPERMISSIBLE LEGAL  
04:03PM 6 OPINION. I JUST DON'T THINK THAT YOU CAN FIND THAT IN THE  
04:03PM 7 CASES, AND THESE WERE THE WORDS THAT HE USED IN THE MOMENT TO  
04:03PM 8 MR. BALWANI AND ULTIMATELY TO MS. HOLMES.

04:03PM 9 THE COURT: RIGHT. I APPRECIATE THAT.

04:03PM 10 I THINK, TO MR. FLEURMONT'S POINT, HIS CONCERN IS THAT THE  
04:04PM 11 JURY MIGHT FIND, OR THE COURT WOULD ALLOW DR. ROSENDORFF, WHO  
04:04PM 12 WE ARE TALKING ABOUT HERE, TO TESTIFY AS TO A LEGAL OPINION,  
04:04PM 13 HIS LEGAL OPINION OF A VIOLATION OF THE LAW, AS OPPOSED TO  
04:04PM 14 WHETHER THE LAB IS FOLLOWING THE REGULATIONS THAT THEY'RE  
04:04PM 15 SUPPOSED TO FOLLOW.

04:04PM 16 I GUESS WHAT I'M SUGGESTING IS, ARE THOSE TWO DIFFERENT  
04:04PM 17 THINGS, OR AREN'T THOSE THE SAME THINGS?

04:04PM 18 MR. FLEURMONT: YOUR HONOR, WE SUBMIT THAT THOSE ARE  
04:04PM 19 TWO VERY DIFFERENT THINGS.

04:04PM 20 THE COURT: AND IF THE COURT WERE TO SAY YOUR  
04:04PM 21 WITNESS IS NOT PERMITTED TO GIVE ANY LEGAL CONCLUSION?

04:04PM 22 MR. FLEURMONT: YOUR HONOR, I DON'T THINK THAT'S  
04:04PM 23 CLEAR ENOUGH GUIDANCE FOR THE WITNESS. I THINK WE NEED TO  
04:04PM 24 UNPACK THAT A LITTLE BIT, BECAUSE AS YOU CAN SEE IN THE  
04:04PM 25 EXHIBITS, HE WANTS TO GIVE LEGAL CONCLUSIONS. HE'S DONE IT

04:04PM 1 ALREADY.

04:04PM 2 AND I DID NOT HEAR MR. LEACH SAY THAT IT WOULD BE  
04:04PM 3 IMPERMISSIBLE FOR HIM TO SAY, DR. ROSENDORFF, FOR HIM TO SAY  
04:05PM 4 EXACTLY WHAT HE SAID IN THAT EXHIBIT, WHICH IS, WE ARE IN  
04:05PM 5 VIOLATION OF THE STANDARD, WHICH I THINK UNDER THE CASE LAW IS  
04:05PM 6 CLEARLY IMPERMISSIBLE.

04:05PM 7 THE COURT: SO IF THE POINT IS, IN HIS OPINION AS  
04:05PM 8 THE LAB DIRECTOR, THAT THE LAB WAS NOT FOLLOWING THE  
04:05PM 9 REGULATIONS, OPERATIONAL, WE WERE NOT FOLLOWING THE  
04:05PM 10 REGULATIONS.

04:05PM 11 WHY WEREN'T YOU? WHAT DO THE REGULATIONS REQUIRE YOU TO  
04:05PM 12 DO?

04:05PM 13 X, Y, Z, WHATEVER THEY ARE.

04:05PM 14 AND WERE YOU DOING THOSE THINGS?

04:05PM 15 NO, WE WEREN'T. AND THAT'S CLIA. I KNOW CLIA. I'VE  
04:05PM 16 LIVED WITH CLIA IN MY 30 YEARS OF EXPERIENCE, ET CETERA,  
04:05PM 17 WHATEVER HE SAYS.

04:05PM 18 ISN'T THAT PERMISSIBLE?

04:05PM 19 AND THEN IF THE COURT WERE TO ADVISE THE JURY, THIS IS NOT  
04:05PM 20 A LEGAL OPINION, THIS IS THE DIRECTOR'S OPINION ONLY AS TO  
04:05PM 21 WHETHER THE LAB WAS FOLLOWING THE REGULATIONS AS HE UNDERSTOOD  
04:05PM 22 THEM, AND THAT WOULD BE TESTED BY CROSS-EXAMINATION.

04:06PM 23 AND IF THE COURT WERE TO GIVE AN INSTRUCTION BOTH AT THE  
04:06PM 24 TIME OF THE EVIDENCE, AS WELL AS IN A FINAL INSTRUCTION, THAT  
04:06PM 25 THE JURY MAY NOT, THEY'RE NOT PERMITTED TO USE ANY ALLEGED

04:06PM 1 VIOLATIONS OF A REGULATION IN THEIR DELIBERATION OF A CRIMINAL  
04:06PM 2 STATUTE, VIOLATION OF A CRIMINAL STATUTE, ISN'T THAT  
04:06PM 3 PROPHYLACTIC ENOUGH TO PROVIDE THE JURY AND PROVIDE YOU SOME  
04:06PM 4 ASSURANCE THAT THEY WON'T DO THAT?

04:06PM 5 MR. FLEURMONT: SO, YOUR HONOR, I THINK WE'RE ALMOST  
04:06PM 6 THERE. BUT I THINK THERE ARE TWO ISSUES BAKED INTO THAT  
04:06PM 7 HYPOTHETICAL, ONE THAT IS, I THINK, MOSTLY TAKEN CARE OF BY  
04:06PM 8 THAT HYPOTHETICAL, AND ONE THAT IS NOT.

04:06PM 9 SO THE FIRST ONE IS THAT THE WAY YOU EXPLAINED, THE WAY HE  
04:06PM 10 JUST WENT THROUGH THE REGULATIONS. I THINK THAT THAT SOLVES  
04:06PM 11 THE LEGAL CONCLUSION ISSUE, BUT IT DOES NOT SOLVE THE RELEVANCE  
04:06PM 12 AND THE PREJUDICE ISSUE WHICH I THINK IS WHAT THE COURT WAS  
04:06PM 13 TALKING ABOUT ON THE BACK END WITH THE CURATIVE INSTRUCTION.

04:06PM 14 YOUR HONOR, WE SUBMIT THAT THAT CURATIVE INSTRUCTION, I  
04:07PM 15 GUESS IS WHERE I STARTED ON REBUTTAL, IS THAT IT'S NOT ENOUGH  
04:07PM 16 BECAUSE, AS I WAS SAYING, THERE'S A DISTINCTION IN THE CASE  
04:07PM 17 LAW. ONE IS WHEN YOU IMPERMISSIBLY INFECT THE TRIAL WITH  
04:07PM 18 GOVERNMENT REGULATIONS, AND THE OTHER IS WHEN YOU TRY TO TAKE  
04:07PM 19 AN ELEMENT OF THE OFFENSE AND YOU SUBSTITUTE THAT WITH A  
04:07PM 20 VIOLATION OF A REGULATION.

04:07PM 21 I THINK THAT IS WHAT MR. LEACH WAS GETTING AT WHEN HE WAS  
04:07PM 22 TALKING ABOUT SOME OF THE CASES.

04:07PM 23 THAT, YOUR HONOR, IS NOT THE WOLF CASE WHICH TALKS ABOUT  
04:07PM 24 THE FORMER. THAT IS THE -- LET ME MAKE SURE AND GRAB THAT. I  
04:07PM 25 BELIEVE IT'S THE EAGLE WHITE CASE. YEAH, THIS IS UNITED STATES

04:07PM 1 VERSUS -- I'M SORRY, NOT EAGLE WHITE, WHITE EAGLE, THAT'S  
04:07PM 2 721 F.3D 1108. IN THAT CASE, THE NINTH CIRCUIT MADE VERY CLEAR  
04:07PM 3 THAT IT'S IMPERMISSIBLE TO USE VIOLATION OF A CIVIL STATUTE TO  
04:07PM 4 IPSO FACTO SUPPLY A CRUCIAL ELEMENT OF A CRIMINAL OFFENSE,  
04:07PM 5 WHICH IS DIFFERENT FROM REPEATEDLY REFERENCING CLIA REGULATIONS  
04:07PM 6 OR CIVIL REGULATIONS AND HAVING THE JURY KIND OF INFER THAT  
04:08PM 7 BECAUSE THESE REGULATIONS WERE VIOLATED, THERE WAS A VIOLATION  
04:08PM 8 OF THE CRIMINAL OFFENSE FOR WHICH MS. HOLMES IS CHARGED.

04:08PM 9 SO OUR POSITION IS THAT A CURATIVE INSTRUCTION WOULD NOT  
04:08PM 10 BE ENOUGH.

04:08PM 11 IF WE REACH A POINT THAT WE HAVE A CRITICAL MASS, IF YOU  
04:08PM 12 WILL, A DISCUSSION OF CLIA REGULATIONS, BECAUSE AT THAT POINT  
04:08PM 13 THERE'S A SERIOUS RISK THAT THE JURY WILL THINK, WELL, BECAUSE  
04:08PM 14 THESE VIOLATIONS -- EXCUSE ME, BECAUSE THESE REGULATIONS WERE  
04:08PM 15 VIOLATED, SHE MUST HAVE DONE SOMETHING WRONG AND SHE MUST HAVE  
04:08PM 16 VIOLATED THE CHARGE FOR WHICH SHE'S CHARGED.

04:08PM 17 THE COURT: SO SHOULD THE COURT BE CONCERNED ABOUT  
04:08PM 18 WHETHER THAT IS THE ONLY EVIDENCE THAT THE GOVERNMENT HAS, AS  
04:08PM 19 OPPOSED TO, IS THERE ADDITIONAL EVIDENCE THAT THE JURY COULD  
04:08PM 20 USE IN THEIR CONSIDERATION?

04:08PM 21 IN OTHER WORDS, IF IT WAS JUST CIVIL REGULATIONS THAT WERE  
04:08PM 22 VIOLATED AND THE GOVERNMENT SEEKS A CONVICTION BASED PRIMARILY  
04:08PM 23 ON THAT, THAT WOULD BE ONE ISSUE.

04:08PM 24 BUT IF THE GOVERNMENT HAS OTHER EVIDENCE, AND MR. LEACH  
04:08PM 25 WILL TELL US IN JUST A MOMENT WHETHER THEY DO HAVE OTHER

04:09PM 1 EVIDENCE, THAT IT WOULD BE FOR THE JURY TO CONSIDER AND TO  
04:09PM 2 DELIBERATE IN ADDITION TO THIS PIECE OF EVIDENCE WHICH  
04:09PM 3 MR. LEACH TELLS US IS REALLY FOR THE ISSUE OF PERHAPS  
04:09PM 4 KNOWLEDGE, NOTICE, AND INTENT.

04:09PM 5 DOES THAT DELETE THAT ARGUMENT SOMEWHAT?

04:09PM 6 MR. FLEURMONT: IT AFFECTS THE ARGUMENT, YOUR HONOR,  
04:09PM 7 BUT IT'S NOT ENOUGH.

04:09PM 8 I THINK WHAT YOU REFERENCED IS TWO SITUATIONS, ONE NOT AS  
04:09PM 9 BAD AS THE OTHER, BUT BOTH TERRIBLE IN A SENSE THAT IF IT'S THE  
04:09PM 10 GOVERNMENT'S ONLY EVIDENCE THAT THERE IS VIOLATIONS OF CLIA  
04:09PM 11 REGULATIONS TO SUPPORT ITS BROAD ALLEGATION THAT THERANOS --  
04:09PM 12 SORRY, I UNDERSTAND I'M SPEAKING TOO FAST -- THAT THERANOS WAS  
04:09PM 13 NOT ABLE TO CONSISTENTLY PRODUCE ACCURATE AND RELIABLE RESULTS,  
04:09PM 14 THEN, OF COURSE, YOUR HONOR, WE WOULD FILE A RULE 29 MOTION AND  
04:09PM 15 THAT WOULD BE THE FEATURE OF THE MOTION.

04:09PM 16 JUST BECAUSE THERE'S OTHER EVIDENCE DOES NOT REMOVE THE  
04:09PM 17 TAINT OR THE INFECTION IN THE TRIAL.

04:09PM 18 IT'S NOT AS BAD AS THE FORMER, BUT THEY'RE BOTH -- WE  
04:10PM 19 SUBMIT THAT BOTH WOULD BE A TERRIBLE RESULT AND LEAD TO ERROR  
04:10PM 20 IN THIS TRIAL.

04:10PM 21 THE COURT: IT'S PROBABLY DIFFICULT FOR A LAWYER TO  
04:10PM 22 TALK ABOUT ERROR IN A CASE WHEN YOU'VE GOT A JUDGE IN FRONT OF  
04:10PM 23 YOU. YES, I REMEMBER THOSE AWKWARD CONVERSATIONS, AND NO  
04:10PM 24 OFFENSE TAKEN. I APPRECIATE THE CONVERSATION.

04:10PM 25 MR. FLEURMONT: THANK YOU, YOUR HONOR.



04:10PM 1 THE COURT: MR. LEACH.

04:10PM 2 MR. LEACH: I LIKE THE HYPOTHETICAL THAT THE COURT  
04:10PM 3 HAD BEEN CRAFTING, SO THAT'S MY POSITION ON THAT.

04:10PM 4 THE GOVERNMENT IS NOT ARGUING THAT BECAUSE MS. HOLMES  
04:10PM 5 VIOLATED OR THERANOS VIOLATED 42 CFR, THAT YOU MAY CONVICT HER  
04:10PM 6 OF WIRE FRAUD.

04:10PM 7 WHAT THE GOVERNMENT IS SAYING IS IF THERANOS WAS NOT  
04:10PM 8 MEETING THE STANDARD SET FORTH IN THAT REGULATION AND THE CMS  
04:10PM 9 INSPECTORS GO IN AND SEE THAT THERE'S THIS MANY NUMBER OF  
04:10PM 10 QUALITY CONTROL FAILURES AND THIS MANY INSTANCES WHERE THEY'RE  
04:11PM 11 REPORTING PATIENT RESULTS AFTER QUALITY CONTROL FAILURES, THAT  
04:11PM 12 IS A PIECE OF EVIDENCE FROM WHICH A JURY COULD CONCLUDE  
04:11PM 13 THERANOS'S TESTS WERE NOT ACCURATE AND RELIABLE.

04:11PM 14 IN ADDITION TO THE VOIDING, IN ADDITION TO THE ACCOUNTS OF  
04:11PM 15 PATIENTS, IN ADDITION TO INNUMERABLE EMAILS TO MS. HOLMES  
04:11PM 16 TELLING HER ABOUT PROBLEMS WITH THE TESTS, IN ADDITION TO  
04:11PM 17 STATEMENTS FROM HER OWN INSIDERS THAT WE NEED TO STOP USING THE  
04:11PM 18 EDISON DEVICE FOR CERTAIN TESTS, IN ADDITION TO EVIDENCE THAT  
04:11PM 19 AT THE TIME THAT CMS HAD COME IN, THEY HAD COMPLETELY STOPPED  
04:11PM 20 USING THE EDISON FOR ANYTHING, ALL OF THAT IS SUFFICIENT FOR A  
04:11PM 21 JURY TO REACH A CONCLUSION.

04:11PM 22 BUT THE GOVERNMENT IS NOT SAYING MERE VIOLATION OF A CIVIL  
04:11PM 23 REGULATORY SCHEME IS ENOUGH. BUT IF YOU'RE TOLD ABOUT THESE  
04:11PM 24 VIOLATIONS -- WHICH DON'T EXIST IN A VACUUM, THEY EXIST TO  
04:11PM 25 ENSURE ACCURACY AND RELIABILITY -- AND YOU IGNORE THEM AND YOU

04:12PM 1 FORCE OUT THE LAB DIRECTOR WHO WAS RAISING THOSE PROBLEMS,  
04:12PM 2 THAT'S SUGGESTIVE OF AN INTENT TO DEFRAUD.  
04:12PM 3 THAT'S WHAT THE GOVERNMENT IS ARGUING.  
04:12PM 4 THE COURT: YOU GET THE LAST WORD. IT'S YOUR  
04:12PM 5 MOTION, MR. FLEURMONT.  
04:12PM 6 MR. FLEURMONT: I WON'T KEEP THE COURT ANY LONGER.  
04:12PM 7 THANK YOU, YOUR HONOR.  
04:12PM 8 THE COURT: ALL RIGHT. THANK YOU VERY MUCH. THANK  
04:12PM 9 YOU.  
04:12PM 10 MR. LEACH: THANK YOU, YOUR HONOR.  
04:12PM 11 THE COURT: ALL RIGHT. THIS ONE IS UNDER SUBMISSION  
04:12PM 12 AND, AS I SAID, I WISH TO GET WRITTEN ORDERS OUT TO YOU AFTER  
04:12PM 13 WE'VE FINISHED ALL OF THE MOTIONS.  
04:12PM 14 I THINK WE'RE FINISHED FOR THE DAY. WE'RE ALMOST ON TIME.  
04:12PM 15 IT'S ABOUT QUARTER PAST THE HOUR.  
04:12PM 16 ANYTHING ELSE THAT EITHER SIDE WISHES TO RAISE TO THE  
04:12PM 17 COURT AT THIS TIME ON ANY ISSUE?  
04:12PM 18 MR. SCHENK: NO, YOUR HONOR. THANK YOU.  
04:12PM 19 MS. SAHARIA: NOT FROM US.  
04:12PM 20 THE COURT: ALL RIGHT. THANK YOU.  
04:12PM 21 MS. KRATZMANN, ARE WE MEETING AT 9:00 O'CLOCK TOMORROW  
04:12PM 22 MORNING?  
04:12PM 23 THE CLERK: I BELIEVE SO, YOUR HONOR. 9:00 A.M.  
04:12PM 24 THE COURT: DOES THAT WORK FOR EVERYONE'S SCHEDULE?  
04:13PM 25 MS. SAHARIA: YES.

04:13PM 1 THE COURT: ALL RIGHT. GREAT. HAVE A GOOD EVENING.

04:13PM 2 MS. SAHARIA: YOU, TOO.

04:13PM 3 THE COURT: THANK YOU.

04:13PM 4 THE CLERK: COURT IS ADJOURNED FOR THE DAY.

04:13PM 5 (COURT ADJOURNED AT 4:13 P.M.)

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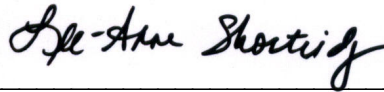
CERTIFICATE OF REPORTERS

WE, THE UNDERSIGNED OFFICIAL COURT REPORTERS OF THE  
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO  
HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS  
A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE  
ABOVE-ENTITLED MATTER.



IRENE RODRIGUEZ, CSR, CRR  
CERTIFICATE NUMBER 8076



LEE-ANNE SHORTRIDGE, CSR, CRR  
CERTIFICATE NUMBER 9595

DATED: MAY 7, 2021